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Our Unelected Representatives

Michael J. Malbin/Michael Andrew Scully

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The Conflicting Goals of National Energy Policy — *Robert E. Hall & Robert S. Pindyck*

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CONTENTS

The Conflicting Goals of National Energy Policy	*Robert E. Hall & Robert S. Pindyck*	3
Our Unelected Representatives: I. Congressional Committee Staffs: Who's in Charge Here?	*Michael J. Malbin*	16
II. Reflections of a Senate Aide	*Michael Andrew Scully*	41
The New "Social Regulation"	*William Lilley III & James C. Miller III*	49
The Mirage of Welfare Reform	*Frederick Doolittle, Frank Levy & Michael Wiseman*	62
Facing the Social Security Crisis	*Martin Feldstein*	88
School Desegregation and the Limits of Legalism	*David L. Kirp*	101
Contributors		61

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The conflicting goals of national energy policy

ROBERT E. HALL & ROBERT S. PINDYCK

NATIONAL energy policy faces a deep conflict in objectives, which has been a major reason for the failure to adopt rational measures: Consumers want cheap energy, but producers need high prices to justify expanded production. So far the goal of low prices has dominated. Through a combination of measures, some longstanding and some thrown together quickly during the energy crisis of 1974, the price of energy to consumers in the United States has been held far below the world level. Domestic producers have been prohibited from taking advantage of the higher world price, and in the case of oil, a heavy tax has been imposed on domestic production to finance the subsidization of imports. These steps have caused demand to increase more rapidly than production, and energy imports have risen to fill the gap. If recent policies are continued, imports will continue to grow. Some painful choices regarding the objectives of energy policy will force themselves upon the United States in the next few years.

The economics of the nation's energy problem involves little more than the principle that higher prices result in less demand and more supply. The exact size and timing of the effects of price on demand and supply are still open to debate, but a summary of recent evidence indicates that demand falls by about one per cent for each four-per-cent increase in price, and supply rises by about one per cent

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for each five-per-cent increase in price. Of course several years must pass before demand and supply fully respond to changes in price, and there is some uncertainty over the magnitude and speed of the supply response, but these numbers provide a reasonable basis for an initial description of the energy market in the United States. Policies in effect today have depressed the domestic price of energy, on the average, by about 30 per cent below the world price. Consumption, then, is about eight-per-cent higher than it would be otherwise, and supply is about six-per-cent lower. Stated in oil-equivalents, the total consumption of energy in the United States is about 38 million barrels per day: 31 million barrels are filled by domestically produced oil, natural gas, and coal, and the rest is imported. Eight per cent of consumption is just over three million barrels per day, and six per cent of domestic production is just under two million barrels, so the policy of depressing prices has the net effect of increasing imports by about five million barrels. But current imports are around seven million barrels per day, so a striking conclusion emerges from these simple calculations: *The problem of rising imports is largely of our own making.* Imports might well be much lower had our energy policy not been based on maintaining low prices.

Why did we inflict these policies on ourselves if they alone are largely responsible for the problem of growing imports? It is not that policy-makers are ignorant of the simple economics of supply and demand, nor even that they underestimated the size of the price effects. Instead, these policies have been moved by the desire to prevent consumer prices from rising, and to block the windfall gains that would otherwise have accrued to producers when world energy prices rose so dramatically in 1973-74, and that would have come directly out of the pockets of consumers. The stimulus to imports has simply been a byproduct of these anti-windfall measures. The paramount goal has been to prevent a wholesale redistribution of income from 215 million energy consumers, many of whom are not very well off, to a handful of producers, most of whom are quite well off. Our policies have achieved this goal, at least in part, and are unlikely to be displaced by alternatives that fail to recognize its extreme importance to the American public.

How current policies keep energy prices low

Two major policies have primarily been responsible for the current large gap between the world and domestic prices of energy.

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The first and more important has the general effect of taxing domestic production of crude oil, and then using the proceeds to subsidize imports, with no net effect on the federal budget. This ingenious policy was conceived and executed in a matter of months in 1974, operates today in a somewhat strengthened form, and is scheduled for demise in 1979. Under its provisions, the Federal Energy Administration sets an average price that domestic producers may receive for their oil (currently $7.66 per barrel). In order to refine domestic crude oil, producers must purchase a ticket called an entitlement, at a cost of approximately $2.00 per barrel. This is the tax on domestic production. On the other hand, refiners who import their crude oil at the world price of about $12.50 per barrel receive entitlements worth about $3.00 per barrel. This is how imports are subsidized. Either way, the effective cost of oil to refiners is the same, $9.50 per barrel. If this system were eliminated today, domestic producers of crude oil would receive the world price (which would mean an increase of about $5.00, or 65 per cent above what they currently get)—which would, after two or three years, increase the domestic supply of oil by about 13 per cent. The cost of oil to refiners would rise by about 32 per cent, and these higher costs would be passed on to consumers. Price increases to consumers would depend on the particular petroleum product; retail gasoline prices, for example, would increase by about seven or eight cents per gallon.

It is ironic that the desire to limit the flow of income from consumers to producers has the side effect of putting the United States government in the business of subsidizing oil imports, a large part of which come from the Organization of Petroleum Exporting Countries (OPEC)—the villain of the price increase in the first place. But the government is incapable of dictating the selling price of oil produced outside the United States, and as long as the domestic price is controlled and imports fill the gap between domestic production and demand, a subsidy for imports is a logical necessity. As imports continue to grow, greater and greater strains will be placed on the tax and subsidy program. As the total dollar volume of the subsidy increases and the domestic base for the tax shrinks, some revenue from the federal budget will ultimately be required to continue the program—unless the average domestic price for oil is allowed to rise. The planned elimination of the program early in 1979 seems problematical from the perspective of today. The powerful forces that brought the policy into being in 1979 will certainly not have disappeared, and no matter what the state of our economy is in

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1979, it will be argued that it is too fragile to sustain the shock of increased oil prices. Government manipulation of oil prices may well turn out to be a permanent feature of the United States economy.

The second major policy directed at maintaining a low domestic price of energy is the long-standing regulation of the price of natural gas by the Federal Power Commission (FPC). The average price of natural gas at the wellhead has for a long time been held far below the world level, which resulted in domestic shortages of natural gas well before the 1973 oil embargo. This policy substantially subsidizes the consumption of natural gas by those who are able to obtain it (mainly households, but also industries in some parts of the country). Those unable to obtain natural gas must shift their demand to oil or electricity. The effect has been to increase the demand for energy by about one or two million barrels of oil-equivalents per day—a major contribution to the import problem. This price policy has also limited the supply of natural gas, since even the prices for new contracts have been held well below world levels. It is likely that the FPC will significantly increase new contract prices—but probably not to the world level—and average wellhead prices will rise only slowly as old contracts expire. There has been little progress in deregulation, again because it entails the redistribution of income from consumers to producers.

Where is national energy policy headed? In the next two or three years, it will be necessary to resolve the conflict between low prices and self-sufficiency. Adopting inappropriate and costly programs is as risky as failing to adopt economically sensible programs.

What energy policy should not do

Continuing the present policies that keep the price of energy artificially low is likely to draw two undesirable responses from policy-makers. First, there will be growing pressure to control energy consumption by other means than price increases. Various schemes are likely to be devised, including controls on the use of heating and lighting, and on the types of cars that can be bought and the speeds at which they can be driven. So far, we have tried only the increasingly unpopular and unenforced speed-limit reduction, and have announced fuel-mileage requirements for cars built in the future. Pressure will mount to impose further controls as imports grow. Proponents of such measures label them as "conservation," but that is not a fair use of the term. The energy crisis has long since eliminated much of the pure waste of energy that previously

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occurred, and most of what still remains largely results from selling energy at a price well below its true value. Controls unnecessarily circumscribe individual choice, leaving people worse off by making their lives colder and dimmer and limiting their ability to travel. The problems of enforcing the 55-mile-an-hour speed limit call attention to the difficulty of limiting demand below the level that people would freely choose, given the price of energy. It is not realistic to project large savings from legislating reduced temperatures in homes or offices, or reduced travel. Trying to do the impossible simply discredits the government. Some conservation policies do make good economic sense when the price of energy is below its true value—for example, encouraging homeowners to insulate their homes by offering low-interest loans. However, the need for this kind of conservation would shrink dramatically if the domestic price of energy were raised to the appropriate level.

The second major threat of mistaken policy is that taxpayers will be asked to finance the difference between the high cost of producing energy in the United States and the low price that consumers are asked to pay. For years the government has subsidized nuclear-generated electrical power, yet even today the future of such uses of atomic energy is seriously under question. Recent policy is moving even further in the direction of subsidizing production: The Energy Research and Development Administration (ERDA) is financing domestic energy projects that are feasible only given a permanent guarantee from the taxpayers that the output can be sold for *considerably more* than the current world price. But it is an illusion to think that Americans are better off with higher taxes rather than higher energy prices. Individuals can choose to avoid high energy prices by limiting their consumption, but high taxes must be paid regardless.

The principal danger today is deep government involvement in exotic new forms of energy, notably gasified coal and oil extracted from shale. So far private industry has been unwilling to involve itself because these energy sources are too expensive, and are likely to remain so for some time in the future. Cost estimates are continually revised upwards every year. (Curiously, the cost of shale oil is invariably estimated to be around $6 above the world price of oil, no matter what the latter happens to be.) It is no wonder, then, that private firms are unwilling to commercialize these forms of energy—they are simply bad bets. But rather than subsidize costly new energy sources, it is preferable to purchase oil from OPEC at world market prices. Offering government guarantees or sub-

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sidies to developers of new energy forms means requiring the nation to pay much more for energy than is necessary.

Those who support government participation in commercializing nonconventional energy forms claim that the risk of developing them is too great to be assumed by private industry. There is some risk, but almost none results from the small likelihood that OPEC will reduce the world oil price. Complete decontrol of oil and gas prices will eliminate the risk caused by present government policies. Most of the risk is just the normal uncertainty associated with any venture involving new and complex technology—which is not the reason that private industry is unwilling to undertake such projects. The problem is that they are just not commercially feasible and are not likely to become so even if OPEC were to continue increasing prices at the rate of 10 per cent or 15 per cent a year for the next 10 years.

What energy policy should do

1. *Eliminate price controls on oil and natural gas:* It is of primary importance to move quickly towards the deregulation of oil and natural-gas prices. Past and present controls have resulted in shortages, increased imports, and the future prospect of higher than necessary prices. In addition, they have resulted in the wasteful consumption of energy resources that have been artificially priced below their true value.

We have already explained how the present system of price controls on crude oil results in subsidizing a growing level of imports. If current controls continue, domestic oil production will diminish as demand continues to grow, and we will soon face an unacceptably high level of imports that will ultimately have to be subsidized directly from general tax revenues. It is therefore essential that crude-oil prices be decontrolled. This will result in greater discoveries and additional reserves of oil, as well as greater production from existing but currently uneconomic sources. By increasing supply and decreasing demand, higher oil prices are a more efficient way to reduce imports than a simple tax that affects only demand. Furthermore, deregulation would result in a lessening of the uncertainty over future prices that is now associated with uncertainty over government policy. The decontrol of crude-oil prices could be done slowly—perhaps over three or four years—in order to avoid a sudden inflationary macroeconomic shock, but it should begin soon.

The regulation of natural-gas markets has been an issue before

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the Congress for some time, but unfortunately no action has resulted. Studies show that if wellhead prices of natural gas are fixed at their recent levels for the next two years, we will experience shortages averaging about 25 to 30 per cent of total demand by the end of that time. Furthermore, these shortages will not be spread out evenly across the country, but will be concentrated in particular areas; in some states there will be shortages that are more than 50 per cent of total demand. This means that curtailment of natural gas will spread beyond industrial users to residential and commercial consumers, so that households may have their gas for heating and cooking turned off. But even if they are limited to industrial consumers, curtailments will result in reduced output and increased unemployment, both directly and indirectly through the effects of supply bottlenecks. We have only begun to experience such shortages this past winter. Obviously they are extremely harmful, and must be avoided.

Shortages of natural gas could be partially dealt with by importing liquified natural gas (LNG). But just as tickets to a Broadway show are sold by scalpers at an unreasonably high price when the box-office price has been set too low, LNG represents an unreasonably costly alternative to domestic natural gas that could be purchased at lower prices under deregulation. In addition, the primary exporters of LNG, Algeria and Indonesia, are members of OPEC. It is interesting to note that recent contracts signed with these exporters call for a wholesale price (after regasification in the United States) of $4 to $5 per thousand cubic-feet—about double the average world market price for energy, and equivalent to oil at $24 to $30 per barrel. Consumers have been saved from higher prices through regulation, only to have to face still higher prices for LNG imports.

The effects of natural-gas shortages go beyond natural-gas markets, and result in increased demand for oil, coal, and electricity. Users who are unable to obtain natural gas do not conserve energy but instead switch to other fuels, which means greater imports.

Econometric research into natural-gas and oil markets indicates that a new contract wellhead price of about $1.70 to $1.80 per thousand cubic feet would be sufficient to clear natural-gas markets within two or three years, given current crude-oil prices; new contract prices of about $2.00 to $2.20 would be sufficient to clear markets, given higher oil prices resulting from the removal of oil price controls. By contrast, the new contract wellhead price has of late been set by the FPC at about 50 to 60 cents. The FPC has recently attempted

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to raise the new price to $1.42, but so far has been blocked by the courts. This policy shift by the FPC represents a large step in the right direction, but is still not enough—since with decontrolled oil prices, natural gas would still be underpriced by about 25 per cent, which would result in the need for growing LNG imports.

The decontrol of natural-gas markets should proceed in the following manner, assuming the simultaneous decontrol of oil prices. New contract prices should be allowed to rise to $1.50 in the beginning of 1977, to $1.75 by the beginning of 1978, to $2.00 by the beginning of 1979, and should be free of all controls by the beginning of 1980. The practice of "rolling in" prices (i.e., averaging the higher new contract prices with the lower old contract prices, so that the consumer faces something in between) means that average wellhead prices would not reach the $2.00 level until 1983. On the other hand, the natural-gas supply will increase significantly over the next few years under decontrol.

2. *Protect the poor:* Policy-makers have been guided by a strong desire to keep consumer prices from rising. We must recognize that the decontrol of natural-gas and crude-oil prices will indeed result in higher fuel prices for consumers: Retail natural-gas prices will increase by about 40 to 50 per cent by 1982, and residential fuel-oil prices will increase by about 20 to 30 per cent, placing a significant burden on lower-income families. A new energy policy must therefore include measures to offset this burden. Expansion of the present food-stamp program to cover fuel expenditures is the most promising way of helping the poor. Food-stamp allotments should be increased, and home-heating bills (or that portion of a family's rent allocated to fuels) and gasoline purchases should be covered under the program.

The cost to the taxpayer would be modest. The expanded food-stamp program would be aimed at the lowest 20 per cent of the income distribution, a group that consumes about seven per cent of the energy used for heating, cooking, and transportation in this country—about .4 billion barrels of oil-equivalent per year. Since the complete decontrol of oil and natural gas would result in an average price increase of approximately $5 per barrel of oil-equivalent, the cost of the program would be about $2 billion per year, which represents only a 15-per-cent increase in the cost of our current food-stamp program. An improved program would be much less costly to the taxpayer than subsidizing the energy consumption of all consumers.

3. *Prepare now to counteract future oil embargoes:* Though an

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improved energy policy would dramatically reduce oil imports, there would continue to be some imports, which probably will rise over the years as the growth in energy demand accompanying economic growth outstrips the growth in domestic energy supply. Dependence on imports raises a serious issue of national security. An anti-embargo policy is essential to prevent OPEC, especially its Arab members, from influencing the international policy of the United States. With effective measures established, the likelihood of an embargo is diminished, and should one occur its effect is minimized. In the absence of such policies, the threat of an embargo is almost as effective as an embargo itself.

The most important anti-embargo measures are standby programs that can be brought into action quickly after an embargo takes effect. A comprehensive policy should include the following:

a) Standby domestic sources of oil: The United States has already undertaken a small program for storing a crude-oil reserve; this program should be continued and enlarged. In addition, existing government-owned petroleum reserves should be brought into production quickly during future embargoes. Finally, state regulation of production should be loosened during an embargo, as it was during World War II.

b) Standby programs for limiting oil consumption: Tax incentives or other methods should be used to induce utilities to prepare to convert to coal in the event of an embargo. This may require stockpiling in some regions. Federal taxes on oil, especially gasoline, should be increased substantially during an embargo to limit lower-priority uses. Regulated sectors dependent on oil, including trucking, railroads, and airlines, should be permitted to raise their rates immediately to pass through these higher taxes to induce their customers to limit use of energy-intensive services.

c) Increased food/energy stamp allotments during an embargo: The adverse effect of increased prices should be offset for poor families by an increase in their share of food/energy stamps. Since poor families consume relatively little energy, during an embargo it is not necessary to ask them to make the same proportional reduction in energy use as families who are better off.

d) Expansionary monetary and fiscal policy: The economy should be kept on an even keel with a limited rate of inflation so that it will never find itself fighting inflation at the same time an embargo is imposed. Then the country will be in a position to tolerate the modest burst of inflation that will inevitably accompany an embargo. Further, the proper use of the food/energy stamp program will limit the damaging effect of inflation on the real incomes of the poor. Some extra stimulus from monetary and fiscal policy will be feasible to counteract the adverse effects of an embargo on unemployment and GNP. Both the embargo itself and the expansionary response to it are somewhat inflationary. However, the termination of an embargo and the cessation of anti-em-

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bargo policies will have an anti-inflationary effect that will come close to offsetting the original inflation; thus an embargo should have no lasting effect on the price level.

These programs would sharply limit the damaging effects of future embargoes. We believe that a successful anti-embargo policy is compatible with fairly high levels of imports, even exceeding current levels. Unfortunately, many believe that national security can be achieved only with a substantial reduction in oil imports. But a permanent reduction of imports is an extremely expensive way to guard against a temporary embargo that may never come. A large reduction can be achieved only with a large increase in the domestic price level. Experience with the 1975 tariff on oil imports showed unequivocally that a tariff on oil increases not only the price of imported oil but also the price of domestically produced oil, by the same amount. Moreover, a tariff raises the prices of other energy as well. A deliberate policy of inflation to limit oil imports is simply counterproductive, especially when there are better ways of achieving the goal of security that are not at all inflationary, except in the unlikely event of an embargo.

Had the above steps been taken during the 1973-1974 embargo, the strain on the country would have been much less. Instead, government policy did nothing to increase domestic supplies during the embargo. Government reserves were not brought into production, nothing was ever done about state restrictions on production, and efforts to limit oil consumption were limited to the 55-mile-an-hour speed limit. As prices rose, little was done to help the poor, and the lack of assistance was a major obstacle to a constructive response to the embargo. In addition, the government did not meet the embargo with an expansionary monetary and fiscal policy—instead, a tax *increase* was proposed while the effects of the embargo were still being felt, and monetary policy during and just after the embargo was more contractionary than at any time in the previous 30 years.

The federal government relied almost entirely on a single tool to deal with the embargo—a gigantic new bureaucracy, the Federal Energy Administration (FEA), which tried to be responsible for the movement of every barrel of oil in the United States. Even though the FEA did nothing to increase supply, and very little to decrease demand, it thought that it could somehow "allocate" oil to users so that everything came out even. But allocation without balancing supply and demand was impossible, and the result was long lines for gasoline.

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4. *Support energy research:* Though the government should keep out of the development and production phases of energy supply, government support of basic research on a reasonable scale is a good economic policy. Better knowledge of energy sources not currently in widespread use has an especially high social value beyond the incentives facing private researchers. Ideas and techniques developed in publicly supported research should be made freely available, and the private sector can be counted upon to commercialize new energy sources that make good economic sense, without any government subsidies.

Good candidates for research support include solar energy, which is the only source of power free of thermal pollution, as well as new technologies for energy conservation. On the other hand, coal gasification and shale oil, although nonconventional, are beginning to move beyond the research stage, and should only receive support aimed at the development of new technologies that might make them economic in the future.

In addition, there should be a shift in the current allocation of support. Currently, over 45 per cent of all energy research funds is directed towards nuclear power, while only five per cent is allocated to conservation. Given the potential environmental and security hazards of nuclear power, together with its questionable economic feasibility, reallocating some of these funds to other nonconventional energy sources would be preferable.

5. *Undermine the OPEC cartel:* Today's high world price for energy is directly the result of the monopoly power of OPEC. The difficult problems of energy policy would largely disappear if OPEC were to disintegrate and the price of oil were to fall to $3 or $4 per barrel. Even though OPEC is by all appearances in robust health today, the United States should do whatever possible to weaken the cartel and encourage its members to cut the price of oil. Economist M. A. Adelman of M.I.T. has proposed an ingenious scheme that deserves a trial. Under his plan, tickets would be sold in an anonymous auction to the highest bidders. Each ticket would give the holder the right to import one barrel of oil. The tickets would be freely transferable, and an active resale market would be encouraged. The system would encourage cheating by permitting OPEC countries to establish brokers who would bid for and purchase tickets in the United States.

Suppose that Libya would like to increase its production by selling a certain amount of oil to the United States at $2.00 below the posted OPEC price. Then a broker representing Libya would bid

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for and purchase tickets (at a price of $2.00 per ticket) that would be transferred to an importing company in return for an agreement to buy oil from Libya. This kind of price undercutting would be hard to detect, since Libya would appear to be selling oil at the posted price, but in fact would be giving a rebate of $2.00 to the United States government in return for an assured sale.

It would be unwise to put too much hope in the success of this plan, despite its ingenuity. It may result in some price undercutting, but it is unlikely to weaken OPEC significantly, and policymakers should probably expect OPEC to set the world oil price for years to come. On the other hand, the plan could at least result in the collection of substantial revenues at the expense of OPEC, and it should therefore be implemented as soon as possible.

The outlook for the future

If our present policies are continued, and if our GNP grows in real terms by about four per cent per year, the total demand for energy in this country will reach about 44 million barrels of oil-equivalents per day by 1980. Domestic production, however, will remain roughly constant at 32 million barrels per day. This will mean a growth in oil imports to around 12 or 13 million barrels per day (about 30 per cent of our total energy consumption, and 70 per cent of our oil consumption), or else increased subsidization of high-priced nonconventional energy sources and increased imports of high-priced LNG to help close the growing gap between consumption and production. Although the average price of all domestically produced energy could be held below $8.00 per barrel of oil-equivalent, the true cost of energy to consumers would begin to rise rapidly as greater tax revenues are used to support the import program and to subsidize nonconventional sources, as taxes are imposed on energy consumption, and as the cost of LNG imports is averaged in with the cost of domestic energy and oil imports.

On the other hand, if the policies outlined above are adopted, the total demand for energy would rise to only 40 million barrels per day in 1980, and supply would increase to 34 or 35 million barrels per day. This would mean a reduction in oil imports to about five or six million barrels per day, a level that would impose no strain on the country's economic and political security. The price of energy would rise to an average of about $12.50 per barrel, but the poor would be buffered from this price increase, and consumers in general would have the option of avoiding some of the extra

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expense by using less energy—as opposed to being forced to subsidize the lower price through taxes.

Adoption of these policies would be a startling turnabout. For the next few years, at least, policy-makers will probably choose to limp along under the present regimen of cheap energy for consumers through subsidizing a growing volume of imports from OPEC. Very soon, however, the limitations of this policy will become painfully apparent. In only a matter of a few years, continuing the present level of subsidy will be feasible only if funds from the federal budget are available to augment the diminishing yield of the present heavy tax on domestic oil production. Then we will enter an era characterized by a growing flow of funds directly from American taxpayers to OPEC—or preferably, a growing acceptance of the need for a higher energy price. But it would be much better to anticipate this problem by moving today toward higher energy prices. Delay will only make the eventual accommodation to the high world energy price all the more difficult.

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Congressional committee staffs: who's in charge here?

MICHAEL J. MALBIN

WHEN I first came to Washington, fresh from academe, I was assigned by *National Journal* to write a story about a conference committee that was deadlocked over the use of Highway Trust Fund money for mass transit. The $23-billion authorization bill was the most significant piece of legislation likely to come out of the House Public Works Subcommittee on Transportation that year (1973), so I decided to interview its chairman, the late John Klucyznski, from Chicago.

When I arrived at his office, the receptionist said that the Congressman would be glad to see me in a few minutes. While I waited, she telephoned one of the committee-staff professionals working on the bill: The Congressman wanted him to sit in on the interview, she said, in case I asked any technical questions. This seemed like a routine procedure, until we got to some of those "technical questions."

I began the interview with what I thought was an easy question (generally a good way to get an interview going): "What makes this issue important?"

"This is a tremendously important bill. It involves millions of dollars," Klucyznski began to answer, and then paused. "No—billions, isn't it?" he asked, turning to the staff aide.

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The significance of that brief exchange was too clear to be missed, even by a newcomer. I was initially shocked, but quickly began realizing that to understand Congress, I had better start paying attention to the role of its staff. That realization has only been confirmed by subsequent experience. Rarely do Representatives or Senators depend as totally on their staffs as Klucyznski did that day, particularly not concerning a major bill handled by a subcommittee they head. Nevertheless, it is not unfair to suggest that Congress as a whole has become the institutional embodiment of Klucyznski's spirit. Congress could not even begin to function today without its considerable legislative bureaucracy.

This represents a revolutionary change in an institution that, as recently as 1945, saw no need for permanent professional committee staffs. The Congressional budget, now approaching $1 billion, is almost 45 times as large as it was three decades ago. In that same time, committee staffs, the most important element of the Congressional bureaucracy in policy terms, have increased fourfold. These numbers only begin to tell the story of staff influence, however. More impressive are the kinds of tasks Members of Congress have become willing to delegate to their staffs. This has reached the point where some Members publicly ask whether they or their staffs are in charge.

In principle, of course, the Members hire, fire, and therefore control their staffs. This is true only to a limited extent in reality. Staff influence arises from the simple fact that Members have more to do than time to do it. The pressures of time prevent House subcomittee members from knowing the details of all but the most important bills that pass before them. In the Senate, where Members serve on many more committees and subcommittees than their House colleagues, few have the time for even that much. The most they can do is learn the major issues of the major bills.

As a result, staff influence extends well beyond the housekeeping functions familiar to most of us. We all know, for example, that committee staffs arrange hearings, see to the printing of the testimony presented there, draft bills, and hold stacks of paper with reams of information for Members during debates. But the way staffs can substantively affect every step in the legislative process may be less familiar. For example, their ability to run committee investigations, the results of which they can skillfully leak to the media,[1] gives

[1] I belong to an association of professional writers, called "Washington Independent Writers." Its October 1976 newsletter contains the following advice for those who want to cover Congress: "Reporters sometimes go for the star,

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them influence over the items Members choose to put on the legislative agenda. Once something is on the agenda, the staff works to assemble a coalition supporting a specific piece of legislation. As it sets up committee hearings, the staff will reach as broadly as possible without sacrificing the goals the chairman, often at their urging, has adopted. Then, when a bill is "marked up" (amended and passed in committee), the staff will be expected to reconcile competing interest-group demands. When conflicts cannot be resolved, the Members may then learn enough about the details to weigh the political costs of compromise. But if the major differences raised by the normally vocal interest groups can be settled otherwise, most Members will be content to leave the details to the staff, as well—details that can frequently mean everything to whole industries or groups of people.

A classic example of what can happen when a Member fails to understand the detailed language written by a staff occurred when Congress was finishing work on the 1974 version of the omnibus energy bill. The Chairman of the Senate Public Works Committee, Jennings Randolph, from the coal-producing state of West Virginia, wanted very much a bill to encourage electric-utility companies to convert to coal. Environmental groups were not happy with the idea of burning more coal, however. Working closely with friendly staff aides to the Chairman of the Public Works Subcommittee on Environmental Pollution, Senator Edmund Muskie, and the ranking minority Member, Senator James Buckley, they wrote strict environmental standards that have deterred conversion. At the time, no one protested the harsh regulations: The electric industry did not want to convert, and the coal interests either failed to notice or failed to state their case clearly. Randolph thought he had won a great victory for coal, and apparently did not catch on until the *New York Times*, several weeks after the bill was enacted, reported the Environmental Protection Agency's interpretation of the law's likely impact. This story is not meant to belittle Randolph. Similar mishaps occur almost daily, especially in the Senate. What makes the example interesting is its very likelihood.

The system that leads staffs to have this kind of influence is, in principle, a rational one. The problems result from how they ex-

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the big name. We forget that the key people are really the staff people. They are the people to cultivate. They are dying to talk to somebody and will help you a great deal. Their names never appear because everything they do bears the name of their Senator or Congressman, but they get terribly excited when they help put an important story out. In the majority of cases, they know what they are talking about when the Senator doesn't."

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ercise the influence they must have for the system to operate. The reason for committee staffs, and the source of their influence, is an extension of the reason for having committees: the idea that Congress is best served if Members serve on specialized committees, with the vast majority accepting the expertise of the few on most issues. Committee staffs grew when it became apparent that even the committee members needed help if Congress was to get the information required for making informed decisions. Congress needs staffs, just as it needs specialist Members, to help it evaluate the flood of material from the outside, and perhaps even come up with ideas of its own. For the most part, the system works. It seems no accident that Congress, the most powerful parliamentary body in the world, is the only one with much staff of its own. Without its staff, Congress would quickly become the prisoner of its outside sources of information in the executive branch and interest groups.

Congress appears to have avoided this difficulty—but at what cost? The new staff bureaucracy and the "legislative explosion" it has helped create threaten to bury Congress under its own paperwork, just as surely as if the staff had never existed. Congress has become just as incapable of evaluating the biases in the information from its own staffs as it has from sources outside Congress.

Not all Congressional staffs produce biased information, however. From a Member's perspective, the problem is that the staffs have grown so haphazardly that almost a specialist's knowledge is required to determine what to expect from different staffs. Nonetheless, committee staffs do fall into a few major categories, with characteristic strengths and weaknesses. The most basic distinction is between partisan and nonpartisan staffs.

Partisans and nonpartisans

Congress first acknowledged its need for permanent committee-staff professionals in the Legislative Reorganization Act of 1946. Committees had been hiring clerks for about a century, but for the first time, each standing committee was permitted, upon a majority vote, to hire four professional and six clerical staff aides. (An exception was made to allow the two Appropriations Committees to hire staff "as necessary.")

At least for the first few years, most committees hired nonpartisan professionals, frequently experienced civil servants from the agencies within a committee's jurisdiction (in sharp contrast to the current practice of hiring inexperienced partisans, straight out of law

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school). The chairman and ranking minority member would generally agree on a staff director, who would then be confirmed by the full committee. If other staff positions fell open, the director and other senior staff members would screen the applicants before presenting the top candidates to the ranking members of both parties. Their joint recommendation would routinely be followed by full committee approval. (The House Armed Services Committee is a committee that still claims to use this procedure.)

This system began to break down rather quickly, as committees began to feel they needed more than four staff professionals. Instead of amending the 1946 Act, Congress created a second kind of staff: the supposedly temporary, annually funded "investigative" staff. On most committees, these quickly became semipermanent slots under the *de facto* control of the chairman. The four permanent professional slots became equally partisan positions on most committees in fairly short order.

The erosion of the original notion of nonpartisan professionalism was formally recognized in the Legislative Reorganization Act of 1970, which, for the first time, permitted the minority on each committee to hire some staff aides (just how many is a battle the Democrats fight all over again every two years). Although the 1970 Act was silent about the majority staff, its statements about the minority presupposed the propriety of partisan staffing.

Staffs can be partisan at the level of the full committee or the subcommittee. On some committees, such as the Commerce and Finance Committees in the Senate, the chairman and ranking minority member control most of the committee staff, perhaps giving control over a few positions to other key committee members. Others, such as the Senate Judiciary Committee and the House Interstate and Foreign Commerce Committee, divide the power to hire and fire the staff among the subcommittee chairmen and ranking minority members. Most staffs today are partisan *de jure* as well as *de facto*, but a few, despite the 1970 Act, remain nonpartisan.

The staff of the Joint Committee on Internal Revenue Taxation is the classic example of a competent staff of neutral professionals that operates in the spirit of the 1946 Act. It behaved in this fashion after the 1946 Act was passed, when John Manley studied the Joint Committee from 1963 to 1966, when David Price studied the Senate Finance Committee from 1966 to 1972, and it continues to do so today.[2]

[2] See John F. Manley, "Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation," *Journal of Politics*, Vol. 30 (Novem-

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The Joint Committee on Internal Revenue Taxation was established in 1926 with little substantive jurisdiction. The 51-member staff—up from 39 in 1974—serves as the primary tax-policy staff for both the Senate Finance Committee and the House Ways and Means Committee, exercising the kinds of responsibilities most committees reserve for their partisan staff. Laurance N. Woodworth was the chief of staff for 12 years before he joined the Carter Administration as the Assistant Secretary of the Treasury for Tax Policy. Woodworth (who received his Ph.D. in public administration from New York University in 1960) had worked for the joint committee since 1944. Determinedly nonpartisan, he regarded his staff almost as if they were civil servants working for the legislative branch. One can get some notion of how unusual this is from the fact that in 1972 Woodworth became the first Congressional employee ever to win the Career Service Award of the National Civil Service League.

Woodworth is an incredibly energetic, competent public servant, whose shoes will be hard to fill. He was admired by almost every one who had to work with him, including those who had reason to be unhappy with the policies the two tax committees were writing. Teams of experts would work on specialized aspects of tax policy, but the task of orchestrating the whole effort—from preparation of a bill by the Ways and Means Committee to modification by the Senate Finance Committee, and in conference—fell to Woodworth. A few Members, especially on the Republican side, thought he tried to do too much, thereby opening himself up to error. But there can be no doubt that Congress' willingness to trust the judgment of Woodworth and his staff concerning numerous and various issues rested in part on the respect they felt for his ability and integrity. This sense of trust never would have developed to the extent it did if Woodworth and his staff were partisan—or if they did not know the limits beyond which staffs should not go.

The connection between the staff's nonpartisanship and the Members' willingness to defer to its judgment is evident at every step of the legislative process, but nowhere more so than in the first stages. Before a major tax bill comes up, the joint-committee staff holds

ber 1968), pp. 1046-1067, and *The Politics of Finance: The House Committee on Ways and Means* (Boston, Little, Brown, 1970); David E. Price, *Who Makes the Laws: Creativity and Power in Senate Committees* (Cambridge, Schenkman, 1972), and "Professionals and 'Entrepreneurs': Staff Orientations and Policy Making on Three Senate Committees," *Journal of Politics*, Vol. 33 (May 1971), pp. 316-336. Recent changes in the House Ways and Means Committee suggest a few things about the conditions under which nonpartisan staffing can operate that were not evident at the time of these earlier studies.

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seminars for Members and legislative assistants to brief them on the major issues, supplemented with background papers that go beyond anything available to any other Congressional committees, except perhaps the budget committees.

Next comes a step that no other committee follows. Instead of beginning with a bill, the Ways and Means Committee normally holds hearings on a loose set of proposals that are not put into legislative form by the joint-committee staff until after the hearings, debate, and an initial "markup." In this way, the Members and staff avoid taking a position on a bill before the committee has had a chance to work its will. This procedure, designed to help foster Ways and Means solidarity and thus preserve its power on the House floor, clearly depends upon the faith Members have that their sometimes loosely worded debates will be accurately translated by the joint-committee staff into the appropriately technical legislative language.

The burdens of neutrality

What are the institutional pillars supporting this unusual staff? To some extent, the mere fact that it serves two distinct committees compels some degree of nonpartisanship. There is no way one staff could serve both committees at the same time if either one felt the staff deliberately favored the other. But although there is a joint hiring arrangement, there are other factors at work.

Woodworth's predecessor, Colin F. Stam, was thought to be impartial between Democrats and Republicans, but not between those who wanted major tax reform and those who did not. Woodworth deliberately tried to correct this perception of the staff and its director, and he succeeded. Woodworth's successor, Bernard M. Shapiro, may have a difficult time preserving this achievement, however. Some pressures that have been developing over the past two years are only likely to grow in the future.

There has been grumbling by Ways and Means Committee Republicans about the performance of the staff in the last Congress. There also were reports in early 1976 that Senate Finance Committee Chairman Russell B. Long was upset by the joint-committee staff although the reports were not confirmed by Long or his staff. No one suggested that Woodworth or his staff had changed. Rather, the common complaint was that Woodworth's ability to work with all sides even-handedly was compromised during 1975 and 1976 by changes within the committee itself, and by the committee's growing workload.

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Twelve new Democrats, almost all liberal, were added to the 25-member joint committee at the start of the 94th Congress—fully one third of the Members were novices who needed Woodworth's seminars on the elements of tax policy. But unlike the newcomers of past years, these freshmen had definite policy ideas, and were unwilling to serve a long apprenticeship before expressing them. This impatience, combined with a lack of concern for consensus building, which distinguished the new Members from the old, resulted in a committee that differed sharply from the one Woodworth worked with for 30 years.

As the Republicans saw it, Ways and Means Committee Chairman Al Ullman felt it was more important to placate the committee's liberals than its conservatives. But neither he nor the freshmen knew the tax code well enough to work out their compromises without the joint-committee staff. Ullman would work something out in principle with the liberal bloc and then go to the staff to put the agreement in concrete form. As a result, according to Representative Barber B. Conable of New York, the new ranking Republican on the Ways and Means Committee, "Larry [Woodworth] was being called on to do a lot more extrication work than he had had to do. He did not enjoy the situation, if I read the signs right. He preferred to be the 'grey eminence.'"[3]

By "extrication work," Conable meant that Woodworth was being asked to step beyond the details normally left to him, and to come up with policies that would respond to the contradictory pressures being placed on Ullman by the committee majority. Although this kind of task is normal for most staffs, it used to be done by the former Chairman of the House Ways and Means Committee, Wilbur Mills.

It should be noted that even if Conable's complaints were accurate, the joint-committee staff under Woodworth was still far less partisan than other staffs. Republicans in both the House and the Senate still felt completely comfortable going to the joint-committee staff for information. They merely felt that the partisan pressures created by the new Members left the nonpartisan staff less time to work with them.

Nevertheless, the current situation says something about the conditions that must be present for nonpartisan staffing to work. At a minimum, a staff can act as a committee's teachers only if the Members want to be taught. Those who do not want to do the detailed

[3] See my article, "Committee Staffs—Growing Fast, But in Different Directions," *National Journal*, Vol. 8, No. 28 (July 10, 1976).

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work Mills did may have little patience with a staff that limits itself to explaining the impact of various policy options and leaving to the Members the burden of both understanding and deciding.

The success of the joint committee's nonpartisan staff also undoubtedly rested upon a sense of policy moderation within the committee, a willingness to let the opposition have the resources to develop its case before the majority became locked into a bill. In the past, the Ways and Means Committee was deliberately filled with moderates who felt their interests were best served by resolving their differences within the committee. Serving on a committee considered by others to be powerful meant a great deal to most of them.[4] Since the appearance of their power was enhanced by the committee's unmatched record of success on the House floor, the Members had a strong incentive to work things out among themselves. The new Members, perhaps because they have not yet made Congress their career, seem less interested in the committee's power within the House. They are more willing to amend the committee's bills on the floor. They even joined in asking the Democratic Caucus to instruct the Rules Committee in 1975 to reject the chairman's request for the customary closed rule on a tax bill (i.e., no amendments to be considered). They are more interested in policy than in unanimity within the committee. If this attitude prevails in the long run, it may make it difficult for Shapiro to preserve the nonpartisan tone that Woodworth established.

Finally, the ability of the joint committee to retain its nonpartisanship rests at least in part upon the nature of its area of concern, taxation. The tax code is extraordinarily detailed, reflecting Congress' desire to keep a degree of control over tax policy that in other areas it might leave to agency regulations. Congress must therefore have the equivalent of professional civil servants on its own staff. Other committees, which tend to make broad policy determinations and then leave the details to the executive branch, do not need the same kind of staff.

Moreover, the nonpartisanship of the joint committee is reinforced by the nature of its expertise. The Ways and Means Committee and the Finance Committee both deal with highly partisan subjects, but there is nothing about the kind of information required that draws the tax expert, as expert, into the partisan fray. Joint-committee staff members are expected to report how much the Treasury might gain or lose from a particular tax provision, given specified economic

[4] See Richard F. Fenno, Jr., *Congressmen in Committees* (Boston, Little, Brown, 1973), pp. 2-5.

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assumptions, or what options exist to a particular provision the committee might consider, with what impact on revenues. Ordinarily, the staff is not expected to defend one set of economic assumptions against another, or to take a position on the need for stimulating or restraining the economy. Nor do they have, as tax experts, any particular reason for entering debates over redistribution, loopholes, or other items that divide the Members. Whatever opinions the staff may have on these matters do not follow automatically from the kind of expertise it provides the committee.

This is in sharp contrast to the nearest analogue to the joint-committee staff, the Congressional Budget Office (CBO). The CBO is regularly asked to discuss the kinds of economic issues—like policies to curb inflation—that require analyses reflecting theoretical differences. Keynesians and monetarists have different views about deficit spending. Their disagreement happens to coincide with the partisan differences between many Democrats and Republicans, but they are nonetheless technical differences among experts. It makes little sense to hire a professional economist and then ask him to be neutral. Professionals who analyze the impact of criminal rehabilitation, federal aid to education, or a host of other subjects must be expected to have opinions about their areas of expertise. In that respect, it is impossible to be both expert and neutral on all questions of policy. If Congress wants balanced opinions, it can hire experts with different professional training, thus permitting opposing opinions to filter through to the Members. Congress would not be helping itself if it hired experts and then asked them to shed their expertise in the name of neutrality.

Nevertheless, there are crucial differences between expert, nonpartisan staffs and partisan staffs. These differences are evident in the activities the staffs engage in and the way they present their information to Congress.

Partisan staffing

The main reason committees have moved away from nonpartisan staffing since 1946 is the political self-interest of chairmen, who want aides responsive to their political needs. Instead of civil servants with years of agency experience, chairmen began looking for young lawyers with politically compatible ambitions. These new staff aides were also told to do different kinds of things: Instead of being asked to interpret, analyze, and react to proposals originating elsewhere, they were frequently told to seek out good publicity

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for their chairmen, either through investigations or new legislative ideas to which a chairman's name could be attached.

The desire among Senators and Representatives for legislation for which they can claim credit has led to what some have called a "legislative explosion": If there is a problem throw a law at it; if the law fails to achieve the desired end, it can be fixed up later. A chairman needs some legislation before the next election, to show his "deep concern." Staffs attracted to and hired for this kind of work tend to differ significantly from the professionals on the nonpartisan staffs. Instead of "grey eminences" hired in mid-career, they tend to be young people who want to "cast a shadow," to use Harry McPherson's term describing his own feelings as a young lawyer coming to work for Lyndon Johnson in the 1950's.[5] Many, like McPherson, will drift toward the executive branch, before ending up as lawyer/lobbyists. Some will become regulatory commissioners instead. Still others run for Congress—eight former aides sought first terms in 1976. (Six were successful.) Only a few stay on Capitol Hill as staff aides, and only a few of them ever come to resemble the older nonpartisan professionals, with their institutional perspectives and memories.

The new partisan staffs bring some things that Congress needs, but the same staff temperament that can help Congress can also get it in trouble if not kept in check. Partisan staffs are particularly useful in unearthing information others have an interest in keeping hidden. Nonpartisan staffs trained to summarize arguments coming from the outside do not have strong track records as investigators, with the important exception of the General Accounting Office (GAO). Although its nonpartisanship compels GAO to sit and wait patiently for someone to request an investigation, the result is a laudable thoroughness that could not be expected for every investigation conducted by Congress in a single year. Congress needs GAO, but it also may need the kind of work done by its own partisan committee staffs. A look at one of these staffs will show why.

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[5] McPherson recorded his thoughts as he drove into Washington on the trip that was to take him straight from law school to Johnson's staff: "Why did I choose this 'experience,' instead of beginning a law practice and finding a responsible place in a small community? Partly because I wanted to find out what goes on in the councils of power—very much as a subway straphanger wants to know about scandals among the famous. Partly because I want to 'do good,' and a decade after Roosevelt it still seems as if Washington is the grand arena for doing good. Partly—perhaps chiefly—because I want to cast a shadow, to feel, however vicariously, that I have affected significant events and therefore exist." (*A Political Education*, Boston, Little, Brown, 1972, p. 8).

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The information monopoly

When Democrats reorganized the House Interstate and Foreign Commerce Committee in early 1975 by giving control of the committee staff to the subcommittee chairmen, the two Representatives who gained the most were John Moss, who took over the Oversight and Investigations Subcommittee, and John Dingell, who became chairman of the newly formed Energy and Power Subcommittee. Both subcommittees are partisan, and both have used their staffs to uncover facts that might not otherwise have come to the attention of Congress. The work of the two subcommittees overlapped a great deal in 1975, as Moss' staff spent a lot of time investigating natural-gas prices. Yet the two subcommittees make for an interesting contrast.

The Energy and Power Subcommittee is an example of the importance to Congress of having an independent check on the information coming from the Executive. There are 15 people working for the subcommittee—13 on the payroll, and two assigned from the full committee staff—including five lawyers, an econometrician, two economist/investigators, one investigative reporter, an administrative assistant, and five research assistants (who also do clerical work).

The staff is obviously structured to be a fact-finding body, and the reason is not difficult to determine. Throughout the debate over oil-and-gas-price deregulation, Congressional Democrats were suspicious of the information they were receiving from the Ford Administration—largely because most of it came from the energy industry. The Federal Energy Administration accepted the figures of the American Petroleum Institute concerning petroleum reserves, and the Federal Power Commission (FPC) used American Gas Association figures for information about natural-gas reserves.

To counter this apparent monopoly, the subcommittee went about gathering information in three ways. First, and most traditionally, it held hearings to collect data and opinions from interested parties. Second, it used its investigators to uncover information that was known to the energy industry and the executive branch, but was not coming out voluntarily. Finally, it occasionally asked its own experts or outside consultants to do original research, or to verify work done by others.

Consider an example of the subcommittee's methods: In October 1975, the staff learned that the FPC had known for four years that natural-gas suppliers were deliberately holding gas off the interstate market and failing to fill their contracts, as they waited for future

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deregulation. But the FPC did nothing about this situation until pressured by Congress and the courts. How did the subcommittee come up with the evidence against the natural-gas industry? Subcommittee-staff director Frank Potter said that one of the jobs of his staff is to know the middle-level bureaucrats concerned with an issue: "You develop working relationships. After a while you get to be good at listening to the sound of the trees and knowing what's thrashing in the underbrush."

Most committee-staff "research" is not original, but merely an assembling of facts already known. Every once in a great while, however, the staff makes an original contribution. During the development of the omnibus energy bill in the second half of 1975, the Ford Administration had been pushing for gradual imposition of a $3-per-barrel oil-import fee, and the subcommittee's young econometrician, Walter W. Shroeder III, tried to determine the likely economic impact of the Administration's proposal. Using an identical computer model, he found that the Administration had understated the adverse economic effects by about half. At first, the Administration and Shroeder had suspicions about each other's honesty, but eventually they began getting the same or similar results —which were closer to Shroeder's estimates than to the Administration's original figures. The result of this staff effort was summed up by one aide: "If you want to know why the President signed the bill [the Energy Policy Conservation Act that maintained price controls], that's why."

How did partisanship contribute in this case to uncovering information that Congress otherwise would not have had? The subcommittee staff was loyal to Dingell, and shared his suspicion that the information it was receiving from the Administration was biased. Thus, unlike a nonpartisan staff, it began with the idea of "looking for the holes" in the Administration's position. It did not have to start from scratch in its analysis, or give equal weight to opposing claims. Such a procedure may not be scholarly, but it does save time—a precious commodity.

Even if the Administration and Congress were of the same party, there is still reason to believe that the same procedure would have been followed. A partisan staff is actually loyal not to a party but to a person—the chairman, or ranking member. Although Dingell might have been more in tune with a Democratic Administration, his political self-interest would still have led him to "look for the holes," and seek to stamp his own mark on Administration proposals or come up with proposals of his own.

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The dangers of partisanship

If the Energy and Power Subcommittee shows the virtues of partisan staffing, the Oversight and Investigations Subcommittee shows its dangers. In its investigations, the subcommittee learned many things of interest about the gas industry, but repeatedly reported only that part of the story that best fit its preconceptions.

When the subject of gas deregulation came up on the House floor in February 1976, Moss' subcommittee prepared a report—specifically labeled a "staff report" that had been neither approved nor disapproved by the committee—called "Questions and Answers About the Nature and Causes of the Natural Gas Shortage." By preparing it in this fashion, Moss and his staff were able to avoid a vote on its findings and, perhaps more importantly, to issue it without a minority opinion.

The report was primarily an effort to discredit energy-industry claims that the natural-gas shortage was caused by regulation, or that it would be eliminated by deregulation. To counter the argument that demand increased because prices were kept artificially low through regulation, the report offered the irrelevant observation that increased demand resulted not from a spontaneous reaction to low prices, but from the aggressive advertising of prices by the gas companies (which, in any case, is not an unnatural practice for private corporations).

Whatever the cause of the shortage, the report does not deny that current annual demand exceeds current annual production. The two longest sections contain interesting information designed to show that there is an economic incentive for producers to withhold gas from the market while they await the next FPC price increase, and that there is evidence of both withholding and underestimating of natural-gas reserves by the industry. Although these sections of the report leave the unbiased reader with plenty of reason for not taking industry claims at face value, they have little to do with the main point at issue: whether deregulation is necessary to stimulate exploration and exploitation. The report's only argument against deregulation consists of one quotation from an FPC official, and some statements about the effect of previous price increases on production. The report does not deal directly with the claim made by the industry that future exploration and exploitation will be considerably more expensive than in the past. The point is not that the natural-gas industry's argument should be accepted, but that a balanced report on the subject should at least acknowledge it and respond to it.

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The most blatant example of the report's selective use of publicly available information is in its estimate of the cost of deregulation to consumers. The report quoted Lawrence Kumins of the Congressional Research Service, who estimated the first-year costs at between $20.3 and $22.4 billion, but it failed to state the controversial assumptions on which his figures were based.

Kumins' estimate was more than double the next highest figure offered by anyone else working on the problem—and Moss' staff knew this. David Schwartz, formerly the second-ranking economist at FPC and then a consultant to Dingell's subcommittee, put the first-year costs at $9 to $11 billion, half the amount of Kumins' figure, but higher than any other estimate. (The Administration's figure was $4 to $6 billion, the industry's was $1 billion, and the General Accounting Office estimated a 10-year cost of $75 billion.) We know that Moss' staff had to be aware of the other estimates, because it even quoted Schwartz's estimate of the cost of deregulation per 1000 cubic feet of natural gas—although not mentioning his estimated total first-year cost.

What Kumins had done was assume that deregulated natural gas would sell at a BTU-parity price equivalent to OPEC oil prices. He may be proven correct by this year's severe winter. But last year his estimate seemed like the worst assumption, and should have been labeled so. By failing to explain this in its report and by not providing alternate figures, the subcommittee staff preyed on the ignorance of noncommittee members to lead them to a prejudged conclusion. Congressional decisions are ultimately acts of faith—prudential judgments based upon the Members' acceptance of others' opinions. When staffs present something in dispute as if it were a fact, they are exploiting that faith to distort the process.

To anyone expecting honest information, it is incomprehensible that the staff report did not let its readers know that Kumins' estimate was only one of several in the staff's possession. The report was simply designed to persuade unknowing Members of the folly of deregulation, without giving them the full benefit of the available knowledge. It was not meant to educate the Members, and could not possibly have done so, either: It was propaganda, pure and simple.

This is not an isolated example, although it may be an extreme one. Other committee reports can be just as bad, although they are normally balanced by the inclusion of some form of minority opinion. Conscious distortions have their source in the same partisanship that helps Congress uncover new information. Staff members who

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are primarily loyal to a Member develop a stake in bills or reports with his name on it.

S. Lynn Sutcliffe, the former chief counsel for the Senate Commerce Committee (who, appropriately, left the staff to form his own lobbying law firm with other staff aides), once defended his professionalism to me in a way that perfectly underscores the problem. Sutcliffe described how the shifting coalitions in the Senate and on his committee once produced three different natural-gas-deregulation bills, each of which looked at different times to be the bill the committee would report. According to Sutcliffe, the staff was prepared to write a favorable report for each bill, showing how the facts commended it above all of the others. As an attorney, he was prepared to write a brief representing his client's interests, whichever bill ultimately proved to serve those interests best.

Sutcliffe's notion of professionalism is widely shared among young staff aides. Although people like Woodworth or Congressional Budget Office director Alice Rivlin may picture the professional staff aide as an expert, Sutcliffe's professionalism is that of the generalist attorney.

The difference is crucial. To the extent that economists or other experts remain true to their professional discipline, they are bound to tell the truth as they see it. The professional commitment of an attorney, on the other hand, is to represent a client. If the client's needs call for some distortion by the attorney, there is nothing unprofessional about that—let the other side bring out the rest of the story. That is what the adversary system is all about.

The problem is that the adversary system bears little relevance to Congress. Two key elements are missing: First, Members depend on their staff precisely because they do not have the time to focus on the issues, unlike a judge or jury examining evidence in a courtroom. Second, there is nothing guaranteeing that opposing points of view will be heard. When the chairman and ranking minority member agree to support a bill, the staff will defend their agreement, but no one presents the other side to non-committee members who might want to hear it.

Entrepreneurial staffs

One additional characteristic of partisan staffs is worthy of attention: Because they are expected to respond to their employers' political needs, they are usually given more freedom than nonpar-

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tisan staffs to seek new legislative issues, or new approaches to old issues. David Price refers to those engaged in such activities as "entrepreneurial" staffs, a description suggesting that they develop a "product," which is then "marketed" to a potential "buyer." The "buyer" is the chairman who invests his prestige and his committee's time in pursuit of the legislative goal produced by the staff. Not all partisan staffs are entrepreneurial, but all entrepreneurial staffs are partisan.

Price tends to think that this entrepreneurial relationship between staff and Member is healthy, because Congress can thus be more far-ranging, more "innovative," and more independent of the executive than it could be by relying exclusively on more closely supervised staffs. But although Price's description seems accurate, his evaluation raises problems. "Innovation" is not an acceptable end in itself. True, a Congress unable to innovate would also be unable to legislate—but not all innovation is worthwhile.

Staffs with a self-interest in innovation, rather than deliberation or oversight, create two specific types of problems for Congress. First, it is difficult for elected representatives to stay abreast of what is done in their name, and the responsibility given entrepreneurial staffs to find new legislative tasks only makes it more so. Much of what the staffs do looks useful when viewed in isolation, but the cumulative impact of staff initiative is flooding the system.

Second, entrepreneurial staffs are rarely made up of independent specialists who limit themselves to the policy areas they know well. Instead, they are manned by lawyers and other intermediaries, whose job is to look for outside experts on whom they—and, through them, the Members—can rely. This is not a problem in itself, but given the heavy work load an entrepreneurial staff can generate, a Member may become so removed from real expertise that he cannot evaluate legislation any better than he could without staff help.

As an example of how staffs act as intermediaries for ideas developed elsewhere, consider the Senate Small Business Committee. Because it had no legislative jurisdiction in the 94th Congress, it was completely free to pick the issues it would examine. The staff director, William Cherkasky, therefore chose issues that would enhance the reputation of the committee chairman, Senator Gaylord Nelson of Wisconsin, and educate the rest of the Senate and the general public. (Cherkasky had been Nelson's administrative assistant for six years before moving over to the committee in 1974, when Nelson became chairman.)

The most critical step for a staff entrepreneur is getting an item

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on the committee agenda. In a lengthy interview, Cherkasky described how the committee decides its course of action: At the start of the session, the staff first puts together a "laundry list" of possible topics for hearings, which it circulates to the appropriate staff people in each committee member's office. After receiving responses from the individual offices, Cherkasky's staff then blocks out a tentative timetable, before meeting with the committee. "The Senators accept about 90 per cent of what's proposed," he said. With this kind of relationship between Senator and staff, the staff aide "can create his own issue if he's smart, and if he sees a Senator who's interested. The important ingredient for a staff person is imagination."

Cherkasky described—as a typical example of how the process works—one item that made the agenda through his own initiative. Under the workers' compensation law, an employee who is injured by machinery, but believes he was not sufficiently compensated, can sue the original manufacturer of the machinery, instead of his employer—no matter how old the equipment, or whether it had been altered or resold. This unlimited liability has resulted in an incredible increase in insurance premiums for manufacturers. One small company's annual rates, for example, went from $500 to $65,000 over a four-year span, with no offsetting increase in business.

Cherkasky said that he became interested in this problem after reading an article in a newsletter put out by the National Small Business Association. After discussing the problem with Nelson, he assigned a member of the staff to gather information from the relevant trade groups and companies. The next step was to "find a Senator who would sit for a couple of days of hearings to expose the problem. . . . I'm not sure we'll lick the problem, but we'll educate the public and educate the Senators. That's what public hearings are all about." Hearings were held in September 1976, with corrective legislation a possibility for 1977 or 1978. According to Cherkasky, the procedure followed—a staff member reads or hears an idea developed by someone else, usually an interest group, and then sells it to the Senators—was normal for his committee.

The new middlemen

The importance of outsiders to the committee process is apparent from another example offered by Price: the 1966 traffic-safety legislation that came out of the Senate Commerce Committee. According to Price, the auto-safety issue became public largely because

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Ralph Nader, then a relatively unknown young attorney, devoted his full time to lobbying Congress. His first success was a set of hearings held in 1965 by the Government Operations Subcommittee on Executive Reorganization, headed by Senator Abraham Ribicoff. When the hearings attracted attention, Gerald Grinstein and Michael Pertschuk, two top aides on the Senate Commerce Committee, saw the auto-safety issue as an opportunity to establish Senator Warren Magnuson, the committee chairman, as having interests extending beyond the "pork-barrel" bills that had previously occupied his committee's attention.

Grinstein and Pertschuk were given great leeway by Magnuson to develop an auto-safety bill. Before becoming too deeply involved, the staff used a tire-safety bill as a trial balloon—which, according to Price, showed Magnuson that he could defy auto-industry pressures: "Grinstein and Pertschuk were subsequently less hesitant to involve Magnuson in the auto-safety issue and to commit him to a relatively hard line."

The legislative vehicle Magnuson's staff used was a 1966 bill, offered by the Johnson Administration, that would have permitted the proposed Department of Transportation to set automobile-safety standards if, after two years of voluntary industry efforts, it deemed them necessary. The Administration's bill was attacked from two directions: Nader wanted immediate, mandatory, federal safety standards; the auto industry, whose most effective lobbyist was Washington attorney Lloyd Cutler, wanted to rely on purely voluntary efforts. According to Price, Pertschuk engineered the compromise that enabled passage of the bill:

> To Pertschuk fell the task of sifting through these proposals, balancing one against the other, and coming up with an equitable compromise. His own sympathies, of course, were more with Nader than with Cutler, but he recognized the legitimacy of certain industry criticisms and was anxious to develop a workable program. In addition, it was necessary to consult with the White House and the Commerce Department, both of whom had a strong interest in the bill. But Pertschuk had a relatively free hand, and his position was immensely strengthened by the backing Magnuson gave him. . . .
>
> Accommodations were made and agreements reached on the staff level. Pertschuk drew on the expertise of both Nader and Cutler, secured the confidence of them both, and occasionally played them off against one another. Only a few issues could not be handled this way and spilled over into committee meetings.

Nader prevailed on the key point: The Traffic Safety Act of 1966 required interim safety standards by January 31, 1967.

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It should be clear from these examples that the entrepreneurial role of the staff is essentially that of a middleman: A staff aide is intrigued by someone else's idea, brings it to the attention of the committee chairman, is authorized to expand it, and then proceeds. There is constant checking as a proposal moves through the committee process, but once a Senator makes a basic policy decision, the staff is normally expected to resolve as many differences as possible among the interested parties, without involving the Senator in the details. The staffs may take the first steps within the legislative branch, but they rarely initiate ideas. The advantage of a good staff is not in coming up with new proposals, but in expanding the pool of resources upon which Congress draws.

The problem is that new sources rapidly become old and familiar. Partisan staffs become comfortable with equally partisan outsiders; the danger is that they may shut off some ideas that would flow to a less partisan staff. For example, the Senate Commerce Committee staff was independent of past administrations and big business on consumer issues, but at the cost of becoming dependent on pro-Nader consumer groups. Business lobbyists who must deal with the committee constantly complain about the treatment they receive. Several have told me that they would rather deal with the equally partisan and liberal House Commerce Committee staff, because they think their ideas have a better chance of being heard.

Whether their complaint is accurate, their perception is widespread enough to indicate a real problem, particularly in the Senate: Once it generates an idea, there is danger that a staff may become a political actor in its own right. The only way a Member can guard against this is through close supervision of the activity of the staff. This is impossible, however. As a result, the only alternative for a lobbyist is to try to bypass the staff, and deal directly with the Member. But a lobbyist will not try this too often, since his political credit is limited, and saved for the most important issues. Other matters will necessarily be left to the staff.

Much of the new power of "public-interest" lobbying groups stems directly from the intermediary role played by entrepreneurial staffs. Young Democratic activists from the top Eastern law schools who work for a Congressional committee feel a basic kinship with their counterparts from the same schools who work for citizens' lobbying groups.[6] Together, they form a network every bit as in-

[6] For example, Pertschuk (A.B., 1954, LL.B., 1959, Yale) and Nader (A.B., 1955, Princeton; LL.B., 1958, Harvard) are good social as well as political friends.

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timate as the one tying business lobbyists to Members of Congress on golf courses.

Who's in charge here?

The fact that some lobbyists have better access than others to some committees is not a problem in itself. If a Member knowingly decides that one source of information filtered by the staff is more trustworthy or politically useful than another source, it makes perfect sense to return to it. Normally, neither the staff nor the lobbyists are technical experts, but they can be helpful if a Member knows what kind of information he is being provided. The problem arises when a partisan committee staff takes partisan information and passes it on without warning to unsuspecting Members not on the committee. This is compounded when those on the committee who supposedly supervise the staff are too busy to understand the issues. Representative Edward W. Pattison, a second-term Democrat from Troy, New York, described the pressures of his situation as follows: "For every minute of your time, there is a demand for five, so you spend a part of the one deciding what to do."[7]

This difficulty is even more serious in the Senate. In 1976 each Senator served on an average of 10 standing subcommittees, compared to 3.5 for each Representative. This disparity in workloads affects the relative importance of committee staffs in the House and Senate. Few Senators are able to keep up with the activities of the subcommittee they serve on, leaving them virtually dependent on their staff in most areas. Moreover, the disproportionate ratio of subcommittees to Senators means that almost every Senator is the chairman or ranking minority member of at least one, and frequently two or more subcommittees. As a result, most Senators have direct control of some subcommittee staff, allowing them to push their own proposals—which diverts them from their work on other subcommittees, leaving them at the mercy of the staff.

Two examples show how Senators can become dependent on the work done by their staff. At the start of his 1976 Democratic Presidential campaign, Senator Birch Bayh was questioned in Los Angeles about his cosponsorship of the omnibus criminal-code revision that had been pending for years before the Judiciary Committee, on which Bayh serves. The questioners objected to a number of

[7] See my article, "A Year Older and Wiser, Freshmen Reassess Their Role," *National Journal*, Vol. 8, No. 7 (February 14, 1976).

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provisions dealing with search and seizure, the ability of an executive-branch employee to claim he was following orders as a defense to a criminal charge, and a host of other topics. By failing either to defend the provisions or to promise amendments to change them, Bayh showed he was ignorant of their precise impact. He withdrew his name from the list of the bill's cosponsors when he returned to Washington.

An even more revealing incident involving Senator Daniel K. Inouye of Hawaii was reported in the *New York Times* (July 28, 1976) by John W. Finney. Inouye serves on the Defense Appropriations Subcommittee. According to Finney, lobbyists for Rockwell International, the nation's 10th largest defense contractor, almost succeeded in blocking a move by liberals on the Appropriations Committee to kill Rockwell's controversial Condor missile program. Rockwell reportedly convinced an inexperienced committee aide, 22-year-old Shannon Cockett, that the program was worth saving, and then gave her the legislative language that served its purposes, which Inouye accepted uncritically.

A Senator rarely admits how little time he has to pay attention to the business done in his name, but Inouye was an exception, according to the *Times:*

> Senator Inouye said that he had accepted the language given him by Miss Cockett because "I have great confidence in the young lady." The Senator said that with all the demands on his time, he had not had a chance to attend a committee hearing on the Condor program and thus relied on the judgment of his aide.

Rockwell eventually failed in its efforts, largely because aides to Senators Thomas F. Eagleton and William Proxmire, both opponents of the program, persuaded Cockett to change the language to tighten Congressional control over the program. But Rockwell did not give up easily: It then persuaded Cockett to make additional changes in the wording of the bill. But she was stopped once more, this time by the staff director of the Defense Appropriations Subcommittee.

The point is not to criticize every Senator or Representative who trusts an aide's judgments. The situation is clearly different when Nelson trusts Cherkasky on small business, or Dingell trusts Potter on energy and power, or Edmund Muskie trusts Leon Billings on the environment, or Henry Jackson trusts Dorothy Fosdick and Richard Perle on defense. All of these people know their subjects, and they have worked together long enough to know one anothers' minds. In each case, the Senator or Representative is quite willing

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to let the public judge his record by the recommendations he accepts from his aides.

The Inouye-Cockett example is another matter entirely. Unfortunately, it is not isolated. Too many of the decisions in Congress —and particularly in the Senate—are made by poorly informed Members who accept the word of poorly informed aides, who in turn rely on the word of a partisan outsider. Since most Congressional decisions are not well publicized, these Members and their aides too often think it is not worth their time to learn more about what they are doing. But how or what can such people be said to be "representing"?

Some recommendations

Members who want to show how terribly shorthanded Congress is would argue that neither Cockett's inexperience nor Inouye's indifference was the real problem. What is needed is more staff: The few thousand aides working for Congress are spread too thin to deal with the information flooding from the executive branch and interest groups.

The difficulty with this view is that a larger staff, particularly if it is composed of partisan entrepreneurs, would generate more information on more issues, increasing instead of lessening the burden on Members. Congress can never "keep up" with the executive branch and the interest groups, and it would be a mistake to try. What Congress needs is not so much the capacity to generate new information, as the ability to select and evaluate existing information critically. The problems caused by staffs frequently have less to do with their ability to gather information than with the way they transmit information for the Members to evaluate.

Partisan staffing and entrepreneurial activity are problematic only in their excesses and abuses, not in their mere existence. Partisan staffs can help Congress uncover information it might otherwise miss. Innovative staffs occasionally produce worthwhile ideas that might have a hard time surfacing elsewhere in government. The real problem is the web of self-interest binding Members and their staffs to the fate of "their" common programs: Members want bills with their names on them; the staff wants to "cast a shadow." Both have political reasons for worrying more about whether "their" program passes than whether Congress considers a bill's merits. Deliberation is seen as more of an obstacle than an opportunity.

One way to break this web would be to make sure that commit-

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tee staffs do not owe their loyalty to one person. If every committee had a nonpartisan staff hired jointly by the majority and the minority, Members not on the committee could feel more secure about the information they were getting to guide their floor votes.

But this simple solution may involve throwing out the baby with the bath water. The ability of Congress to move quickly to counter partisan arguments coming from the outside may depend upon the existence of at least some staff aides chosen for partisan reasons. Perhaps Congress could resolve the dilemma with "dual staffing": Committees could have a core of nonpartisan professionals on the staff, supplemented by partisan slots controlled by the majority and minority. The House Budget Committee adopted this practice, in theory, when it began business in 1975. And Chairman Ullman told me he wants to beef up the partisan staff of the Ways and Means Committee precisely because he wants to permit the nonpartisan staff of the Joint Committee on Internal Revenue Taxation to go about its traditional business in its traditional way.

Committee staffs that would draw on the virtues of both experienced, nonpartisan civil servants and young, partisan, trouble-shooting lawyers make some sense institutionally. Politically, however, there are barriers to such an arrangement. Members have let the current staffing system evolve because many see it as serving their political self-interests. If that perception is accurate, there is little hope of changing the system by appealing to any less self-serving motive. Congress can be changed only if Members think their individual political needs are not being ignored in the process.

What Members need to understand is that their self-interests are no longer served by the present system. Voters have become increasingly skeptical of the government's ability to deliver the services it promises. As a result, Members have to take more factors into account when they calculate where their self-interest lies. It is not enough just to know whether a program will bear their names. They must also know how it will affect their careers in the long term, and for this they may need to know whether future opponents will be able to attack them for pushing a short-sighted folly. For this task they will need some unbiased experts on their staffs; entrepreneurial lawyers are simply not equipped to handle such questions.

Some Members of Congress are not unaware of these new needs, as is apparent from the 1970 Legislative Reorganization Act, which transformed the Legislative Reference Service into the Congressional Research Service (CRS). That bill required CRS to do more

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long-range research for committees than had been done in the past. CRS has also helped fulfill another need, on a selective basis, by producing pro/con arguments on some of the major issues before Congress.

CRS is now terribly overworked and understaffed. Although it does good work, for the most part, it cannot realistically be asked to do more with its present staff. But giving it an adequate staff means creating a large bureaucracy that would probably be too far removed from the direct control of the elected representatives. An expanded CRS more closely tied to the committee system would be an improvement over the present situation, but not as much as "dual staffing" would be: Dual staffs would have the added advantage of trimming the self-justifying activities of entrepreneurial staffs.

However, a tradition has developed in Congress that Members should be free to use their staffs as they see fit, within the bounds of ethics and propriety. The presumption among most Members is that committee staffs "belong" to the chairman and ranking minority member. On some committees, each Member has a staff aide of his own, but this does not represent a change in the principle of ownership, only its distribution.

It is not inconceivable that this barrier to "dual staffing" could be overcome. Chairmen are less powerful than they used to be. In addition, a growing number of Members are concerned about the institutional needs of Congress for information. Given the way committee staffs affect Congress as a whole, we should hope that Members will accept the notion that a staff belongs to a committee, not to individual Members. In fact, would it be too much to ask the Members to think of the staff as ours, not theirs? After all, they are writing our laws, and our money pays all their salaries.

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Reflections of a Senate aide

MICHAEL ANDREW SCULLY

I had been working in the Senate only two weeks, and enjoying it very much. I especially relished the greatest privilege of a legislative aide—easy access to the Senate floor—and, in my new blue suit, did everything in my power to be mistaken for a Senator.

But one morning, Senator James Allen of Alabama introduced two amendments that chilled those of us on the staff couches at the rear of the chamber. The first would have banned staff members from the floor while the Senate was in session. The second would have forbidden Senators to read from prepared texts of any kind—which meant, in effect, texts prepared by their staffs.

My prerogatives—and my job—were eventually spared, as anyone more familiar with the Senate could have predicted. Allen never even requested a vote. Had he done so, he would have lost badly, for what is called the "modern Senate" cannot function without its staff—in its chambers or anywhere else.

A Senator today bears many responsibilities. He must stay abreast of legislation on the floor. As a member of several committees and numerous subcommittees, he must attend a half-dozen or more meetings per week, where he must display detailed knowledge of committee legislation and the activities of executive agencies. He must listen to representatives from interest groups concerning is-

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sues as diverse as abortion and rebuilding locks on the Mississippi River. At the same time, he must harry the bureaucracy to release job funds for a city in his home state, and search for Mrs. Jones' lost social security check. He receives 50,000 or more letters per year from constituents—and all of them must be answered, for he is, after all, a politician. And he must make numerous speeches in his home state every year.

Many of these duties are not new. Yet the growth of the federal government and the development of speedy transportation and communication have transformed old responsibilities into daily chores. The Senate remains a comparatively small body, and is therefore "exclusive"—but it often seems more like an exclusive track team than a club. Even the Commission on the Operation of the Senate recently agreed with this characterization:

> . . . each Senator's day is a scheduler's nightmare. There were constant interruptions, specific activities took an unanticipated amount of time, and seldom were there blocks of time of sufficient duration to permit Senators to follow through to their satisfaction on the matter at hand.

And so enter Senate aides. They listen to interest groups and constituents for 20 minutes, thus freeing Senators from listening more than five. Some aides answer correspondence all day long; others operate form-letter machines. Many search for Mrs. Jones' social security check, or help hundreds with similar problems. There are other aides who work on legislative matters, some as members of a Senator's personal staff, others for a committee.

The key role played by Senate aides was summed up in a statement by freshman Senator Robert Morgan, on the Senate floor in September 1976. Although he overstates his case, his description of representative government in America offends less because it is not wholly accurate than because it is not unspeakable:

> This country is basically run by the legislative staffs of the Members of the Senate and Members of the House of Representatives. We ought to have the best staffs available that we can find anywhere, because they are the ones who give us advice as to how to vote, and then we vote on their recommendations.

A bill is born

On any midweek afternoon, the Senate floor, anteroom, and reception area teem with bright-looking, well-dressed aides. More than a dozen dot the couches at the rear of the chamber, or sit in straight-backed chairs next to Senators who are taking part in

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debate. In the staff gallery, another two dozen listen to the proceedings on the floor below. Throughout the reception area, other aides sit, talk, smoke, and wait.

There are a half-dozen Senators scattered throughout the chamber; several more sit in their party's cloakroom. Of the Senators on the floor, only three are actively taking part in the proceedings. Next to each sits an aide. The two Senators nearest the front are the majority and minority floor leaders on the bill being debated; they are assisted by committee-staff members.

The third Senator is not a member of the committee in which the legislation originated; he is attended by an aide from his personal staff. Neither he nor his aide is intimately familiar with the bill. Nevertheless, the Senator has an amendment that he believes worthy of consideration, and although it is not directly related to the pending legislation, he has selected this bill as the best "vehicle" for his proposal. Even if his amendment loses, a substantial show of support will encourage the committee chairman to hold hearings on similar legislation in the future, and propel a new bill along the more conventional route of committee action.

Little staff effort was needed to develop the proposed amendment. More than likely, the Senator's legislative staff had been required to draft legislation on the subject earlier in the year. After speaking with experts in the field, staff aides solicited suggestions from knowledgeable committee-staff members, and explained the proposal to a member of the legislative counsel's office—a pool of lawyers responsible for putting such proposals into legislative language. After a draft bill was completed, the Senator's aides reviewed the proposal to be certain that it fit their understanding of his intentions. Next, an aide drafted an explanatory statement to be inserted in the *Congressional Record* on the day of the proposal's introduction.[1] The Senator then reviewed the staff drafts of the proposal and the floor statement. The staff then put the Senator's original proposal into amendment form. Aides carefully sought the advice of the parliamentarian to be certain of the proper form, and to make sure that there were no procedural bars to presenting the amendment at this time.

After the Senator has presented his arguments in favor of the

[1] In most cases a "Dear Colleague" letter is circulated to other offices, soliciting the cosponsorship of favorable Senators. To a large extent, both the floor statement and the "Dear Colleague" letter are intra-staff communications—because, as with much Senate business, the *Record* is mostly read by staff members, who screen legislative proposals and "Dear Colleague" letters, passing along only the more agreeable ideas to the Senators.

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amendment, he asks for the "yeas and nays." Throughout the Senate buildings, one long bell signals the roll-call vote. In the chamber, aides to other Senators leave the staff couches; above, the staff gallery clears. Aides surround the phone bank in the small foyer off the anteroom, and describe the amendment to their employers or other staff members who remain in the Senate Office Buildings. Usually, an amendment is known and discussed well enough in advance that little explanation is required. If an amendment is unexpected or requires elaboration, staff members form a herd near the four elevators reserved for Senators during roll-call votes. There, they overcome distractions long enough to formulate a concise explanation of the amendment at issue: A half-dozen sentences is usually the most time will allow.

The amendment is defeated, as are most attempts to circumvent the committee process. But a number of Senators remain on the floor, for a roll-call vote on final passage of the legislation seems near at hand. The bill's floor managers begin to recite from scripts provided by the committee staff. This colloquy, as it is called, is meant to clarify some aspect of the legislation not directly addressed in the text of the bill. The resulting statement of "legislative intent" will later serve as a directive to agencies assigned the task of promulgating regulations. Yet it is a mark of how far the Senate has strayed from its popular image as a deliberative body that "legislative intent" is mostly determined from scripted colloquies and committee reports—both prepared by the staff.

After his colleagues have finished speaking, one Senator apologizes for missing earlier floor discussions. He asks whether the bill before the Senate is expected to have an adverse or beneficial impact on his region of the country. His question is unexpected, but the majority floor leader responds that it should benefit all regions of the country. A committee-staff member pulls a sheet of paper from a large manila folder, and places it on the rostrum. The floor leader glances at the page, and continues his answer, this time citing specific projections of dollar amounts and job increases. The inquiring Senator is satisfied, thanks his colleague, and sits down.

In their turn, the majority and minority floor leaders make final statements regarding the bill's merits and flaws, often departing from the texts prepared by the staff to comment on some item they believe deserves special attention. They then yield the remainder of their time, and the presiding officer instructs the clerk to call the roll. Again the bell rings, and the staff gallery and couches clear.

The bill passes, the Senate adjourns, and Senators and staff re-

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turn to their offices. Only a staff member whose Senator participated in the debate needs to return to the Capitol later, and then only if the Senator requests that the transcript of his remarks be edited for the *Congressional Record,* and posterity.[2]

Who runs the show?

Most bills reach the Senate floor only after months of development in a committee process involving the staff at every turn. How could it be otherwise, when, in 1976, there were 31 committees and 174 subcommittees?

Whether a legislative proposal originates with a Senator, a staff member, or a lobby group, the responsibility for translating it into legislative language, and nursing it through the committee process, rests largely with the staff. Indeed, the success or failure of a piece of legislation often depends upon whether a Senator is a member of the committee involved, and thus has a committee or subcommittee staff member who can be considered an "insider" by others on the staff, and give the legislation regular attention.[3]

My first encounter with a committee staff was a dismal failure. As a novice aide from the personal staff of a Senator who was not on the Labor and Public Welfare Committee, I was in the worst possible position. My efforts to gain support for a proposal to partially exempt patient-workers from the minimum-wage provisions of the Fair Labor Standards Act seemed doomed from the start.

"Oh, yes, you're the one with the peonage bill," the majority staffer began. (Me? Peonage?) "Look, I can tell you right now, the committee's not going to look favorably on this thing. Before you go too far, you'd better call so-and-so at the A.F.L. . . ."

[2] The office of the Official Reporters of Debates does a remarkable job of quickly making available accurate transcripts of floor proceedings, and does its best to limit editing to grammatical changes. Nevertheless, one Senator recently described the *Congressional Record* as "a report of what Senators wish they would have said on the floor rather than what they actually did say. With unlimited 'corrections' of the *Record,* the official report of floor debate has become our own newspaper and we sit as the editorial board."

[3] Most Senate staff members are young and ambitious. Many regard their jobs as stepping stones into law firms that are attracted by their familiarity with other committee staffers and Capitol Hill operations, or into the lobbying offices of the industries, unions, and trade organizations over whose affairs they had been drafting legislation. (Such mobility is characteristic more of committee-staff members than personal-staff aides, who tend to be less "marketable" because of their less specialized responsibilities and fewer contacts.) It is difficult to see how such mobility could be proscribed: A staffer who coddles farm interests is unlikely to be restrained by a Senator who joined the Agriculture Committee in the first place because farmers comprise 30 per cent of his constituency.

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I called a top minority staffer. But he was even less encouraging: "The Committee's going to oppose you on this thing. For one thing, we recess next week, and we need clean bills [bills without amendments that would require a conference committee]."

"Well, can we get hearings after recess?" I asked.

"Listen, you're not going to get any support for it in this committee, and if you try to tack it on as a floor amendment, we'll kill it."

That "we" was meant, no doubt, to refer to the committee's Senators and staff. In practice, however, the staff alone can be the executioners of bills on obscure subjects, for they do the explaining to committee members. Since Senators not on a committee are predisposed to abide by the wishes of committee members when voting on matters with which they have little familiarity, committee staffs exercise substantial influence. The extreme, but common example of this occurs when committee or subcommittee chairmen defer to the judgments of senior staff members whether to accept or reject floor amendments to major and detailed bills.

In discouraging my efforts, the committee aides had done nothing that was not in keeping with their duty to represent the views of their respective Senators. They knew that major unions opposed any legislative action on the subject of patient-workers, and they opposed the proposal in the belief that, once informed of the union position, their Senators would oppose it as well.

Most legislative staff work involves representing Senators and being generally helpful in ways that save their time. Yet, as the committee process demonstrates, staff influence on legislation—its formulation, passage, and later interpretation—has taken on surprising proportions.

1. The staff organizes all hearings on specific pieces of legislation, as well as the more general "investigative" hearings. Witnesses are frequently selected by the staff, subject to the approval of the Members. Staff aides brief Senators on the subject matters of hearings, and supply questions to be asked of witnesses.

2. The drafts of committee bills are written by the staff in "staff markup" sessions in which aides present the views of their Senators. These staff drafts are then amended by Senators in a "committee markup."

3. A staff-written "committee report" accompanies every bill that reaches the floor. Although they are often partisan, these reports serve as the major channel of information between the committee and other Senators and staffs. On emergency bills, or late in a ses-

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sion, they must be written in haste. Despite the fact that they are almost exclusively staff-produced and rarely receive more than cursory Senatorial attention, they are the major guideposts for judicial and agency interpretations of Congressional intent.

It is the rare case of staff abuse that receives press attention, but it is hardly newsworthy that with 7,000 aides there is an occasional deviation. A Senate staff with 7,000 members—now that is newsworthy! Indeed, the real significance of the growth of the Senate staff is probably unrelated to any particular staff function, healthy or abusive. The real question is not "Who runs the Senate?" but rather which group—the elected or the unelected—dominates the operations: Senators, by being elected, or, staff, by being so numerous.

If the authority of the Senate were to shift, ever so slowly, from the elected to the unelected, from the principals to their seconds, that would be the most newsworthy event of all—and the most difficult to discern.

The future of the Senate

I find it difficult to believe that the men who established representative government in the new United States were indifferent to the principle of representation. Rather, I think that they did not consider it an insufferable contradiction that representative government was at once the best form of government and the most difficult to maintain. They recognized the world's imperfection and the need to defend against it. According to Number 62 of *The Federalist*, the Senate was established to answer certain specific purposes that, if neglected, would cause a republic to "suffer inconveniences." Those inconveniences are described there, and in the succeeding paper. They read like an indictment.

The Senate was to satisfy the need for a perspective that would protect the citizenry from the ravages of ever-changing laws, which by their nature benefit the wily and unscrupulous:

> What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well constituted Senate?

In troubled times, the Senate was to be the refuge for "the cool and deliberate sense of community," to thwart factional schemes

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as a "temperate and respectable body of citizens." It was to fill the need for a "due sense of national character."[4]

Instead, the major national debate of this century, about the use of public monies for social purposes and the resulting growth of the federal government, has taken place largely outside the Senate. H & R Block is now everyman's protection against an ever-changing, labyrinthine tax system—which is, as so very much legislation, a monument to faction. The public senses a chronic confusion about national direction, but no Senator can be expected to meet the demands of his constituents and have time for the reflection or deliberation necessary to develop a long-range perspective. And these pressures increase the dependence of Senators on their unelected junior partners, whose fate thus becomes inseparable from the institution of the Senate itself.

But the rapid growth and increasing responsibilities of the Senate staff also betray the inability of the Senate to perform a function into which it has mistakenly drifted. The Senate was never intended to oversee the details of an executive branch of present-day proportions. Moreover, it cannot attempt to do so without altering itself so fundamentally that it ceases to be a Senate at all, but becomes instead a kind of House, in which the unelected outnumber the elected by 70 to one. And in the end, I suspect that the sheer weight of such numbers can only make election to office something of a technicality.

I am fully aware of the consequences of this suggestion, and admit to being less than wholly soothed by the knowledge that the executive bureaucracy is, after all, an executive responsibility, and that the House has demonstrated itself to be the far superior branch for "checking" the details of bureaucratic action. Yet I would rather have a Senate of elected "generalists" who could seriously discuss the ideas, aspirations, and direction of the nation than a Senate of nonelected aides and experts. In a government composed of millions of artisans hammering away, there ought to be a little room reserved for architects.

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[4] In this passage from *The Federalist*, "Publius" focuses on the importance of a sense of national character for gaining the respect of foreign powers. The test of our sense of national character today, however, may be domestic, rather than foreign: our diminishing affection for localities, states, and perhaps even religious and social bonds. Declining state and local autonomy may erode public appreciation of representative government by diminishing the importance of and interest in the public contributions of individuals. If so, the visible example of a legislative body—small enough that its members can become familiar to the public—deliberating on issues of genuine importance may be essential to representative government in America.

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The new "social regulation"

WILLIAM LILLEY III & JAMES C. MILLER III

THE last few years have witnessed a quiet explosion in the scope and pervasiveness of federal regulation. Beyond a small group of experts and practitioners, however, little notice has been taken, even though this constitutes a significant change in the relationship between the federal government and the private sector, with highly significant economic and political implications.

As shown in Table I on the next page, the growth in federal regulatory activity has been dramatic. Over the period 1970 through 1975, the number of pages published annually in the *Federal Register* more than tripled, while the number of pages in the *Code of Federal Regulations* grew by 33 per cent. Although the total budget of the major regulatory agencies (nearly $4.7 billion in fiscal year 1975) is small compared with the combined federal budget ($235 billion in fiscal year 1975), it does not reflect the costs incurred by private participants in the regulatory process nor the gargantuan costs—and, presumably, benefits—imposed on the private sector by agency decisions. For example, according to the Council on Environmental Quality, the regulations of the Environmental Protection Agency (EPA) will cost the economy an *additional* $40 billion per

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TABLE I. *Indices of Growth in Federal Regulation, 1970-1975*

YEAR	NUMBER OF MAJOR "ECONOMIC" REGULATORY AGENCIES[1]	NUMBER OF MAJOR "SOCIAL" REGULATORY AGENCIES[2]	EXPENDITURES OF MAJOR "ECONOMIC" REGULATORY AGENCIES (IN MILLIONS)[3]	EXPENDITURES OF MAJOR "SOCIAL" REGULATORY AGENCIES (IN MILLIONS)[4]	NUMBER OF PAGES IN FEDERAL REGISTER	NUMBER OF PAGES IN CODE OF FEDERAL REGULATIONS
1970	8	12	$166.1	$1,449.3	20,036	54,105
1971	8	14	$196.8	$1,882.2	25,447	54,487
1972	8	14	$246.3	$2,247.5	28,924	61,035
1973	8	17	$198.7	$2,773.7	35,592	64,852
1974	9	17	$304.3	$3,860.1	42,422	69,270
1975	10	17	$427.6	$4,251.4	60,221	72,200
Per Cent Increase (1970-1975)	25	42	157	193	201	33

[1] Agencies included: Civil Aeronautics Board, Commodity Futures Trading Commission (1975), Federal Communications Commission, Federal Energy Administration (1974-75), Federal Maritime Commission, Federal Power Commission, Federal Trade Commission, International Trade Commission (1974-75), Interstate Commerce Commission, Securities and Exchange Commission, and the Tariff Commission (1970-73).

[2] Agencies included: Agricultural Marketing Service (1972-75), Atomic Energy Commission (1970-1974), Consumer and Marketing Service (1970-71), Coast Guard, Consumer Product Safety Commission (1973-75), Employment Standards Administration (1971-75), Environmental Protection Agency, Equal Employment Opportunity Commission, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Food and Drug Administration, Mining Enforcement and Safety Administration (1973-75), National Highway Traffic Safety Administration, National Labor Relations Board, National Transportation Safety Board (1971-75), Nuclear Regulatory Commission (1975), Occupational Safety and Health Administration (1973-75), Occupational Safety and Health Review Commission (1971-75), and Workplace Standards Administration.

[3] Source: *The Budget of the United States*, 1972 to 1977.

[4] Source: Same as footnote 3. Total expenditures of all agencies listed in footnote 2 above, except only health- and safety-related expenditures for the following agencies: Atomic Energy Commission (1970-74; "regulatory activities"), Coast Guard ("operating expenses": merchant marine safety and marine law enforcement/marine environmental protection), Federal Aviation Administration ("operations": flight standards program, medical standards program; "facilities": engineering and development; and "safety regulation"), Federal Highway Administration ("motor carrier and highway safety"), and Federal Railroad Administration ("Bureau of Railroad Safety").

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year by 1984.[1] In just one recent proceeding, a report commissioned by the Occupational Safety and Health Administration (OSHA) admitted that the OSHA proposal then under consideration could impose capital costs of $18.5 billion, and billions of dollars more in annual operating costs.[2]

Coping with the flow of federal regulations has given rise to a sizable corps of regulatory professionals—private as well as public. In 1975 there appeared in the *Federal Register* 177 proposed new rules and 2,865 proposed amendments to existing rules. During the same period, the *Federal Register* published 309 final rules and 7,305 final rule amendments. This means that during 1975, agencies had under consideration over 10,000 regulations—and this represented a 14 per cent increase over the previous year! As shown in Table I, between 1970 and 1975 seven major federal regulatory agencies were created—all with their own objectives, their own approaches, and their own styles of dealing with adversaries appearing before them. Equally important, as shown in Table II on the next page, over this period 30 important laws were enacted, making substantial changes in our regulatory framework.

This escalating flow of regulations and the proliferation of new agencies and laws have had a number of little-noticed yet important effects. One presumably unintended result is that since larger institutions can more easily participate successfully in the regulatory process, and since regulations tend to impose costs on institutions in less than direct proportion to their size, the current approach tends to penalize smaller institutions (e.g., highly competitive, small-scale entrepreneurs and loosely organized labor groups) and reward bigness. This could lead to more concentrated industries and larger and more powerful unions.

Another important effect results from the timing of regulation. While it is relatively easy in the short run for industry to adjust to a few regulatory changes, or in the long run to adjust to several, it is terribly difficult to adjust well to many regulations in a short

[1] See Council on Environmental Quality, *Environmental Quality: Seventh Annual Report* (Washington, Government Printing Office, 1976), p. 145. Other sources report higher costs. For example, a recently published staff report to the National Commission on Water Quality estimates that meeting 1983 standards for water pollution alone will require industry to spend $59.2 billion for capital equipment and another $12.6 billion annually for operation and maintenance. (See *Staff Report to the National Commission on Water Quality,* Washington, Government Printing Office, 1976, section I, p. 34.)

[2] See Bolt, Beranek, and Newman, Inc., *Economic Impact Analysis of Proposed Noise Control Regulations* (Washington, Occupational Safety and Health Administration, 1976). The study did not attempt to quantify the benefits of the proposal in monetary terms.

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TABLE II. *Important Federal Regulatory Legislation, 1970-1975*

YEAR ENACTED	TITLE OF STATUTE
1970	Clean Air Amendments
	Occupational Safety and Health Act
	Poison Prevention Packaging Act
	Securities Investor Protection Act
1971	Economic Stabilization Act Amendments
	Federal Boat Safety Act
	Lead-Based Paint Elimination Act
1972	Consumer Product Safety Act
	Equal Employment Opportunity Act
	Federal Election Campaign Act
	Federal Environmental Pesticide Control Act
	Federal Water Pollution Control Act Amendments
	Noise Control Act
	Ports and Waterways Safety Act
1973	Agriculture and Consumer Protection Act
	Economic Stabilization Act Amendments
	Emergency Petroleum Allocation Act
	Flood Disaster Protection Act
1974	Atomic Energy Act
	Commodity Futures Trading Commission Act
	Council on Wage and Price Stability Act
	Employee Retirement Income Security Act
	Federal Energy Administration Act
	Hazardous Materials Transportation Act
	Housing and Community Development Act
	Magnuson-Moss Warranty–Federal Trade Commission Improvement Act
	Pension Reform Act
	Privacy Act
	Safe Drinking Water Act
1975	Energy Policy and Conservation Act

period of time. Moreover, the political will to impose regulations may be increased because of the tendency for there to be a lag between the time when costs are imposed and when they are borne. For example, a politician may be able to please an advocate of regulation by favorable action, and when the costs are finally apparent no one associates them directly with his action.

The "new-style" regulation

The rising tide of regulation primarily reflects a growth in "social" regulation rather than the old-style "economic" regulation (see Table I). While all regulation is essentially "social" in that it affects

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human welfare, the economic/social distinction emphasizes some very significant differences. The old-style economic regulation typically focuses on markets, rates, and the obligation to serve. Thus an enterprise wishing to engage in interstate transportation must obtain from either the Civil Aeronautics Board (CAB) or the Interstate Commerce Commission (ICC) a "certificate of public convenience and necessity" (which specifies the markets to be served), must have its rates approved, and must open itself to all comers (i.e., meet its "common carrier obligation").

On the other hand, the new-style social regulation affects the conditions under which goods and services are produced and the physical characteristics of products that are manufactured. As an example of the former, the EPA sets constraints on the amounts of pollution a manufacturer may emit in the course of its operations. As an example of the latter, the Consumer Product Safety Commission (CPSC) specifies minimum safety standards for products that in its judgment are potentially "unsafe."

The new-style regulation also extends to far more industries and ultimately affects far more consumers than the old-style regulation, which tends to be confined to specific sectors. Whereas the effects of CAB regulation are largely limited to air carriers (including their stockholders and employees) and air passengers, the regulations of OSHA apply to every employer engaged in a business affecting commerce.

With the new-style regulation, the government often becomes involved with very detailed facets of the production process. As a result, the business manager has fewer "degrees of freedom." For instance, the approach of OSHA in recent cases has been to specify not performance standards but the precise engineering controls that must be adopted.[3] The CPSC does not merely require that products be safe but mandates (often in great detail) certain characteristics that products must have.[4] The Federal Trade Commission

[3] See the recent decision by OSHA in the case involving exposure to coke-oven emissions (41 *Federal Register* 46762). The former Administrator of OSHA, Dr. Morton Corn, was reported as hinting that this approach would become formal policy toward worker health and safety. (See the *Wall Street Journal*, October 21, 1976, p. 2.) This policy was continued in a recent OSHA proposal applying primarily to the textile industry. (See "OSHA Proposes Standard for Worker Exposure to Cotton Dust, Sets April 5 Hearing," United States Department of Labor Release No. 76-1528, December 23, 1976.)

[4] Cf. 16 CFR 1207 *et seq.* on non-full-sized baby cribs; and 16 CFR 1512 *et seq.* on bicycles. Recent CPSC activity indicates that priority attention is being directed to such items as matches, contact adhesives, upholstered furniture, aerosols, household chemicals, Christmas tree lights, soft-drink bottles, ladders, and children's toys. See "CPSC Releases Product Profiles," Consumer Product Safety Commission Release No. 76-67 (October 17, 1976).

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proposes that truthful advertising of over-the-counter drugs can only use certain words and not others. This kind of activity involves the government in many more details of business management, and consequently regulatory agencies have become a major factor in determining product and service costs as well as the choices available to consumers.

As should be apparent, the quality of regulatory statutes and the performance of regulatory agencies should be a matter of great public concern. Although most of us prefer a cleaner environment, freedom from occupation-related accidents and diseases, safer automobiles, less discrimination in employment and education, and less risky market transactions, we must acknowledge the tremendous costs involved in achieving such worthwhile objectives and address the problem of maximizing the *net* benefits derived. In order to do this, we must confront the issue of benefits and costs squarely. Some of the benefits and costs of regulation are becoming evident and are being widely discussed, at least within professional circles. For example, many serious policymakers and analysts are examining the tradeoffs between improved health and safety and the costs thus imposed.[5] But this kind of evaluation has just begun; accelerating it to improve the performance of our regulatory institutions could mean enormous gains to society.

Our year's experience at the Council on Wage and Price Stability monitoring the regulatory activities of the federal government convinces us that the net benefits from regulation are lower than they should be; in short, the country is paying far too much for what it is getting.[6] In some important instances, the whole regulatory approach is at fault and thus the enabling legislation and those responsible for it should be blamed. But in all too many cases the problem is the poor performance of the regulatory agencies. We have observed that decision-makers often approach issues with the

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[5] A growing number of experts have begun to focus public attention on this issue. Among others are Allen V. Kneese and Charles L. Schultze, *Pollution, Prices, and Public Policy* (Washington, The Brookings Institution, 1975); Nina W. Cornell, Roger G. Noll, and Barry Weingast, "Safety Regulation," in Henry Owen and Charles L. Schultze, eds., *Setting National Priorities: The Next 10 Years* (Washington, The Brookings Institution, 1976); and several of the recent "evaluative studies" prepared under the auspices of the American Enterprise Institute for Public Policy Research (e.g., Robert S. Smith, *The Occupational Safety and Health Act: Its Goals and Its Achievements,* 1976; Henry G. Grabowski, *Drug Regulation and Innovation: Empirical Evidence and Policy Options,* 1976; William M. Wardell and Louis Lasagna, *Regulation and Drug Development,* 1975; and Sam Peltzman, *Regulation of Automobile Safety,* 1975).

[6] Under the Council on Wage and Price Stability Act, the Council monitors activities of the federal agencies and intervenes in regulatory proceedings.

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wrong attitude, without necessary technical skills, and often without sufficient information.

The combination of escalating activity and poor performance by regulatory agencies is a matter that merits serious concern—over not just the conventional economic costs, but also some problems resulting from the present system that pose a danger to certain of our democratic processes.

Presidential power and public faith

Two potential threats to our democratic processes that flow from the present scope and method of regulation are worth noting. First, the regulatory activity in the health, safety, and environmental areas concentrates enormous amounts of power in the Presidency. This new nucleus of power could prove irresistible in some future crisis, real or imagined: Some future President might be tempted to use *overtly* legal means to achieve *covertly* illegal ends.

As an instructive illustration, imagine a President today confronting the steel industry, as President John F. Kennedy did in 1962. It is striking how much more power a sitting President could exercise today in "jawboning" down price increases. President Kennedy was limited to harassing steel executives by ordering visits from agents of the Federal Bureau of Investigation and the Internal Revenue Service and threatening to sell off stockpile reserves, but a sitting President today could literally shut down the entire industry—by the simple expedient of sending OSHA and EPA inspectors to the major plants with orders to leave no stone unturned. Needless to say, it is almost impossible to ensure that any given plant will always be in full compliance with the thousands of OSHA and EPA regulations now on the books, many of which reach down into the most minute details of production. As a result of even an implied threat, industry executives might well choose to roll back prices on the wholly rational grounds that absorbing the losses would cost less than a forced shutdown.

A second danger is the possibility that imprudent and unnecessary "overstrengthening" of government through the accretion of new regulatory powers and controls could ultimately, and paradoxically, lead to an undermining of the public's "faith in government"—a backlash against *all* government because of an eventual negative reaction to the perceived regulatory "excesses" of the mid-1970's. In short, in the late 1970's there may be a replay of the attitudes concerning *domestic* issues of the late 1960's—which were dominat-

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ed, in part, by a popular reaction to the legislative excesses of the Great Society and by a corresponding loss of public confidence in government.

The Great Society programs were perceived to affect directly only a fraction of the society—the poor and the near-poor—and much of the public consternation concerned what the programs did *not* do rather than what they did. On the other hand, regulatory failures affect us all, and the potential reaction will arise concerning what regulations have done *to* us, as well as what they did not accomplish. And because it tends to be very easy to launch new programs and difficult or impossible to cast them off, the public may be "stuck" with the costs of an oversold program, just as we have found it difficult to alter those Great Society programs that proved to be unsuccessful. This "ratchet effect" could intensify disgruntlement over perceived regulatory excesses, and the resulting backlash could inflict deep and lasting wounds on public trust in the competence and integrity of government.

Why regulation costs more than it should

From our experience at the Council on Wage and Price Stability we have concluded that the regulatory decision-making process is inefficient, that it leads to costs much higher than would be necessary to secure the stated objectives. There are several reasons for this poor performance.

First, many decisions are reached on the basis of grossly inadequate information. While many people are under the illusion that regulatory decisions are made only after serious evaluation of a "full and complete record," often this is not the case. Sometimes information is available and could be analyzed, but decision-makers do not bother to get it, and the adversary process, governed by the Administrative Procedures Act, does not supply it. On other occasions, it is simply unavailable or would be difficult to obtain—yet decisions are nonetheless reached as if evidence existed to substantiate them. In any event, opportunities are often missed for achieving regulatory goals at lower cost, or reaching higher goals at the same cost.

Even when information about the ramifications of a proposed regulation is available, decisions do not necessarily reflect rational judgment concerning costs and benefits. In some cases, only the most extreme and unrealistic assumptions could lead to the conclusion that a regulation is worth its costs and should be promulgated,

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or that its costs exceed its benefits and it should thus be rejected. In other cases, where regulatory agencies have discretion to make the regulation "stronger" or "weaker" (or "tighter" or "looser"), little attempt is made to trade off costs and benefits. As a result, a regulation is often promulgated whereby the final incremental improvement to achieve a stated objective yields small benefits relative to costs or great costs relative to benefits. In addition, regulators often do not evaluate the components of a comprehensive regulation. For example, there may be several ways of reducing worker exposure to an airborne carcinogen (e.g., exhaust fans; automatic, enclosed transport of the target substance; and more frequent cleaning of work areas), and the proposed regulation may require certain steps to be taken in all of these areas. Yet, it may ignore differences in the marginal costs of these methods compared with the marginal effects that they have. Such disregard invariably leads to excessive regulatory costs for a given level of benefits, or lower benefits for a given level of costs.

Finally, in all too many cases there is strong resistance to considering alternative and sometimes truly innovative approaches. In many cases OSHA refuses to entertain the use of personal protective devices (e.g., goggles or earplugs) even when they could secure a safe and healthy working environment at a small fraction of the cost of mandated engineering controls. As required by statute, EPA refuses to consider effluent-charge approaches to controlling pollution, and instead mandates standards for maximum effluents.

Since cases of the sort just described are found throughout the whole of regulatory activity, it would appear appropriate to ask, "Why?" Our own experience in serving as the federal government's "watchdog" over regulation has convinced us that there are two major reasons: a) the constraints placed on regulators that *forbid* them to make rational decisions, and b) the nature of the bureaucrat/decision-maker and the incentives to which he responds.

Actually, the number of instances where statutes prohibit agencies from considering the costs and benefits of proposals is not all that large, although important cases are alleged to exist. For example, the Clean Air Act of 1970 specifically instructs EPA to establish air-quality standards based on considerations of public health, and this has been interpreted within the agency to mean that other considerations, such as economics, simply cannot be considered. Somewhat the same argument has been made regarding the enforcement by EPA of the Water Pollution Control Act, even though the Act itself contains numerous provisions urging a cost-effective

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regulatory approach. In one case brought to our attention, pulp and paper producers in the Northwest are being required to install secondary liquid-waste treatment plants even though they empty into the Pacific Ocean, with little or no damage to the environment according to expert scientific opinion. Here is a case of regulation imposing sizable costs with little or no benefit to society.

To the extent that a statute forces an agency to promulgate regulations that are contrary to the public interest, or to the extent that an agency's decision-making is guided by "political" pressures from Congress and the White House, then the blame for "bad" regulation must be shared by these parties. However, it has been our experience that much of the problem lies with agency decision-makers, whose actions can be explained by the type of people agencies tend to attract and the economic incentives they respond to on the job.

"Quis custodiet ipsos custodes"?

Regulatory agencies tend to lure personnel who "believe" in regulation. It is not surprising, for example, that EPA has a reputation for having a staff composed largely of "environmentalists" (just as ICC is staffed principally by people who disagree strongly with those economists who argue that the transportation sector would be much more efficient without regulation). Moreover, abetted by the civil service system, regulatory agencies tend to be staffed by people who are risk-averse, very security-conscious about their jobs, and unwilling to take initiatives they fear may conflict with the agency's "mission." These tendencies are reinforced by actual on-the-job incentives to produce inefficient regulation.

It has been our experience that, particularly in the area of social regulation, many officials behave as though driven by a desire to "punish" a transgressor. Understandably, kicking around some company because it has done something wrong can be fun. Treating all polluters as sinners is also much easier than making quantitative judgments about optimal levels of cleanliness in the air and water, but it leads to inefficient regulations, especially where governing statutes imply rigid, national, uniform standards. An example of this is the recent EPA regulation requiring that motorcycles emit no more pollution than automobiles, despite the fact that alternative approaches could reduce pollution at far less cost. A major reason for the regulation was the conviction of the EPA staff that letting motorcycle owners off "scot-free" would be "unjust."

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As another example, there is evidence that cleaning up the steel industry costs more marginally than cleaning up the paper industry. A cost-minimizing approach to effluent reduction would mean going "light" on steel and "heavy" on paper. But EPA is reluctant to do this, some say, because this would mean "letting big steel off," while "punishing" the paper industry for the transgressions of the steel industry.

The tendency toward a rigid framework can be very costly. For example, EPA recently established new water effluent guidelines for the $35-billion-per-year iron and steel industry. Compliance with these guidelines, EPA estimated, would cost the industry (and ultimately consumers) $2.5 billion in added capital costs, and $1.3 billion annually in added operating and maintenance costs. These costs are unnecessarily high, the Council on Wage and Price Stability has argued, because EPA treats *uniformly* all the five major processes in the industry involving heavy waste loads of total suspended solids. EPA does so even though the marginal costs of cleaning up each vary widely.[7] Obviously, there exists an opportunity for EPA to establish new standards calibrated to reduce water pollution by the same amount as originally proposed, but at a lower cost to society.

The risk-aversion and security-consciousness of government regulators cause them to try to avoid criticism, which in turn breeds rigidity and inflexibility. This explains a number of bureaucratic traits. First, once a regulation has been proposed (usually in the *Federal Register*), there is great resistance to having it withdrawn for fear that withdrawal would be looked upon as an admission of incompetence. Second, regulations are often proposed and promulgated prematurely, for fear that delay in meeting arbitrary deadlines would invite criticism from Congress. Third, regulations are often proposed or promulgated under the pretense that available information justifies them, for fear of protest from vocal constituencies. Fourth, there is even a tendency to propose or promulgate "extremist" and/or "nonsense" regulations, for fear that failing to leave any stone unturned would raise questions about the regulators' "commitment" to the social objective.

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[7] For example, the incremental annual costs per ton of total suspended solids removed by added controls range from about $1,957 for the "hot forming primary with scarfing" process, to about $18,000 per ton of total suspended solids removed by the "integrated seamless pipes and tubes" process. (See "Comments of the Council on Wage and Price Stability on Effluent Guidelines and Standards for Existing and New Sources in the Iron and Steel Manufacturing Point Source Category," June 24, 1976.)

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The tendency toward risk-aversion extends up as well as down the hierarchy. The bureaucratic "loop" that any regulation must clear before being published in the *Federal Register* is typically so extensive, and the "sign-offs" so numerous, that one cannot blame inefficiencies solely on low-level bureaucrats. Misguided and inexperienced GS-13's do not publish regulations in the *Federal Register*. While they might draft them, only very senior officials are authorized to approve them for publication, usually only after an extensive clearance process within the agency. For example, regulations proposed in 1974 and 1975 by the Department of Housing and Urban Development typically required the ratifying initials of 13 individuals scattered among no fewer than four offices within the Department *before* the proposal was forwarded to the Secretary or the appropriate Assistant Secretary.

Notwithstanding this elaborate safety net, a growing number of highly questionable regulations are appearing. These often simply evoke laughter and ridicule, but they are sometimes quite serious in their repercussions. There are numerous recent examples: The Department of Health, Education, and Welfare once proscribed father-son/mother-daughter dinners; EPA has approved regulations forbidding steel companies to allow their plants to emit any visible emissions whatsoever; OSHA informed businesses that their toilet seats cannot be round but must be horseshoe-shaped, and proposed that farmers and ranchers must provide enclosed toilet facilities within five minutes walking distance of any point where employees are at work.

Moving toward accountability

Our experience at the Council on Wage and Price Stability has convinced us of two things: Many regulatory laws are poorly drawn, and the agency decision-making process is not performing very well. The result is that the public is paying far more than necessary to achieve the legitimate goals of regulation.

With respect to traditional economic regulation, more and more questions are being asked and closer scrutiny is being undertaken. In the past year there have been rail-reform legislation, numerous proposals to reform airline regulation, at least one serious proposal to reform the regulation of the trucking industry, and various other proposals to minimize the anti-competitive and inefficient controls imposed by the traditional economic regulatory agencies.

But although the old-line agencies have their critics, government

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action has really shifted to the new-style social regulatory agencies, where fewer questions are being raised. It is easy to understand why these agencies are getting a freer ride. Most have been around only a short time, and many think it is too early to be very critical of them. Moreover, in the minds of most of the public, the regulatory objectives are within reach and the costs either will not materialize or will be borne by someone else. Sooner or later, however, the moment of truth will come and the public will hold government accountable for the performance of the new social regulators. That moment may be closer than many in government now realize.

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The mirage of welfare reform

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PRESIDENT Carter has promised to submit a welfare-reform package to Congress in the not too distant future. The time seems right. The welfare explosion of the late 1960's has subsided, as have the echoes of anti-welfare hysteria. A new wave of research has dramatically increased our understanding of the current welfare system. As a result, the President's analysts should find it easier to design an intelligent proposal with favorable political prospects. But this is not to say that any drastic "overhaul" of the system is a foregone conclusion. Indeed, that is unlikely—and probably undesirable.

Many critics have charged that the current system is replete with problems, all of them very serious and none of them amenable to a solution, short of total reform. Consider the list of indictments: The welfare system is inequitable; it often pays inadequate benefits; it breaks up families; it places too heavy a financial burden on local governments; it tolerates massive fraud; it intrudes too greatly into recipients' lives; it offers no incentives to work; it bypasses the working poor; it is an inefficient tangle of separate programs. In the face of all these difficulties, it might seem foolish for the President to squander political capital on proposals that only tinker with the status quo.

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Yet, upon reflection, tinkering is almost surely what is required, what is actually possible. From a political perspective, the current welfare system is a web of vested interests; any program change will be met by political opposition. If the President's plans are to receive Congressional approval, he will have to limit opposition by limiting the extent of his reform. And such restraint is also desirable on programmatic grounds. As we shall argue, welfare—as it now exists in some areas and could exist everywhere—is already more "reformed" than most people realize. Most of the remaining gaps in the system can be filled by specific incremental legislation. The result will not resemble the efficient, uniform system that many writers describe. But it is the beginning of welfare wisdom to recognize that such idealized systems cannot be achieved, no matter how ambitious the legislation.

A look at the current scene

The cornerstone of the current welfare system is Aid to Families with Dependent Children (AFDC). AFDC began life as a minor title in the Social Security Act of 1935, with the purpose of extending aid to "children deprived of parental support or care by reason of death, continued absence from home, or physical or mental incapacity of a parent." There were certain program guidelines, including the restriction of aid to female-headed families and to two-parent families where the father was disabled. But most matters, including payment levels, were left to the states. Congress tried to encourage adequate benefits through its cost-sharing formula, but explicitly refused to mandate minimum benefit levels.

State administration of the federal program continues through the present—creating, in essence, 51 AFDC programs. The state programs differ most markedly in the level of benefits: In 1975, a family of four could receive a maximum of $60 per month in Mississippi, $153 in Georgia, $170 in Florida, $317 in Illinois, $349 in California, and $400 in New York. Depending upon a state's per-capita income, the federal government picks up between 50 and 83 per cent of these benefit payments, and between 50 and 90 per cent of other administrative costs.

Some of the variation among the states reflects regional differences in the cost of living, but most results from their varying ability and willingness to pay. Federal law requires each state to publish an annual "needs standard," an estimate of a family's minimum financial requirements. By these estimates, an AFDC payment for a

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family of four in Georgia represents 67 per cent of its "need"; in Florida, 74 per cent; in Ohio, 59 per cent; in Alabama, 60 per cent. In only 21 states do "needs" and payments coincide.

The states have also differed in their responses to federal program reforms. In 1961, Congress passed legislation creating AFDC-U (Aid to Families with Dependent Children—Unemployed Parent). AFDC-U was an attempt to counter the most serious criticism of AFDC: that by denying benefits to families with able-bodied men, AFDC encouraged family disintegration. But as with AFDC, AFDC-U was offered on a federal cost-sharing basis, at a state's option. Today AFDC-U exists in 26 states and the District of Columbia. The remaining 24 states, mostly in the South and Southwest, continue to deny federal welfare benefits to most two-parent families.

In 1967 Congress addressed itself to the charge that AFDC provided a disincentive to work. This criticism, voiced by such economists as Milton Friedman and James Tobin, was based on the way benefits were calculated under AFDC. In each state, an eligible family was entitled to a certain maximum payment according to the number and (in some cases) ages of the family members. This maximum payment was then reduced, supposedly dollar for dollar, by the amount of family earnings. In a world where recipients abhorred charity and would seize any opportunity to work, this formula was sensible enough. But in the economists' world, where one dollar is as good as the next, this arrangement was equivalent to a 100-per-cent tax on earnings: If earnings increased by a dollar, welfare payments would decrease by a dollar, so income would stay the same.

In actuality, this "tax" was both more complicated and more liberal than was popularly supposed. When a state paid maximum benefits below its needs standard, it often allowed a recipient's earnings to fill the gap, with only a fractional reduction in benefits or no reduction at all. Moreover, studies of welfare records by Leonard Hausman and Michael Wiseman now indicate that caseworkers often allowed large, unverified deductions for work expenses, which kept effective tax rates below 60 per cent.

But Congress responded to the popular impression of a 100-per-cent tax by adding the "$30 and one-third" rule to the guidelines for benefit calculation. This rule instructed caseworkers to ignore the first $30 of a recipient's earnings and one third of all additional earnings, when computing benefits. At the margin, an extra dollar of earnings would result in an extra 33 cents of income. Although

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clear in the abstract, this rule had different effects in different state systems. Today, the precise relationship between earnings and benefits is calculated according to one of eight different formulas, depending upon the state. In all of them, however, an extra dollar of earnings reduces AFDC payments by significantly less than a dollar.

Not being satisfied with the "disregard" (as it is called) provided by the "$30 and one-third" rule, Congress at the same time added the Work Incentive Program (WIN). As a condition of continued welfare eligibility, WIN currently requires fathers in the AFDC-U program, and mothers and some older children in AFDC families, to register for work with the state employment service and to be engaged in active job search or training programs. WIN began as an administrative nightmare, requiring the cooperation of the Department of Labor and of Health, Education, and Welfare at the federal level, and welfare departments and state employment services at the local level. As a result, the number of placements in either training or jobs grew very slowly at first. WIN was substantially strengthened in 1971 (under the Talmadge amendments to the Social Security Act), and participation among welfare recipients has grown rapidly since.

The recipient explosion

But the intricacies of benefit calculation and work registration are primarily the concern of administrators, social scientists, and a few recipients. To the public at large, the most interesting (and frightening) aspect of AFDC has been the growth of the recipient population. In 1950, AFDC covered 2.2 million people. By 1960, the number had increased to 3.0 million; by 1967, to 5.3 million; by 1971, to 10.6 million. After 1971, growth slowed dramatically, so that today the rolls stand at 11.3 million people. But this still means that one out of every 20 citizens receives AFDC, at an annual total cost of almost $10 billion.

The recipient explosion of 1967-71 was the subject of a good deal of popular writing, offering a variety of explanations. Daniel P. Moynihan attributed part of the increase to a new wave of family breakups among poor blacks. Francis Fox Piven and Richard Cloward saw the explosion as the product of a heightened political consciousness among the poor. According to the Piven-Cloward thesis, large numbers of female-headed families had long been eligible for AFDC, but had refrained from applying because of

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the stigma and the bureaucratic humiliation. During the late 1960's, these women, encouraged by legal-aid offices and welfare-rights groups, changed their minds and decided to claim what was legally theirs.

In retrospect, it appears that Piven and Cloward explained the increase better (although the family disintegration to which Moynihan pointed was real enough). Independent calculations by Barbara Boland of the Urban Institute and Dorothy Projector of the Social Security Administration confirm that, as late as 1966, more than one third of female households eligible for AFDC were not receiving benefits. By 1971, this proportion had fallen below one tenth. Meanwhile, AFDC had become a guaranteed income for female-headed households (though not necessarily an adequate one), in the sense that those eligible for benefits received them as a matter of course: They did not regard the program as providing only emergency assistance.

The "big three"

Although AFDC once stood alone in providing broad-scale public assistance, it is now part of a "big three" with Medicaid and food stamps. Food stamps have always served two functions—providing relief to the poor and thus stimulating demand for agricultural products. The program began in 1939 as a supplement to the direct distribution of agricultural commodities. It affected a limited number of people (who were already on relief), and was terminated in 1943. President John Kennedy revived food stamps as a pilot program in 1961 in certain depressed areas, including Appalachia. In 1964, President Lyndon Johnson raised the program to the federal level, but as with AFDC, it continued to be at the option of the states. The federal government specified the maximum benefits a family could receive (i.e., the face value of the stamps), but the counties decided whether to administer the program, and the states set the eligibility criteria.

In 1971, the food-stamp program was liberalized and extended nationwide. Today, a family of four can buy a monthly package of stamps worth $166 in food. Eligibility criteria are uniform across the country, and stamp distribution is mandated in all jurisdictions. The value of the stamp package is recalculated annually to compensate for changes in the price of food. The amount the family pays for these stamps is adjusted for its income, but in no case exceeds 30 per cent of family income. As with AFDC benefits, a

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dollar increase in earnings results in less than a dollar reduction in benefits.

With the 1971 changes and the growing participation rates, the food-stamp program has become, in Richard Nathan's phrase, a "mini-negative-income tax." The liberalization of the food-stamp program arrived just in time for the 1973-74 inflation in food prices —33 per cent in two years—which substantially increased the face value of the monthly food-stamp package *and* the number of families eligible for food stamps. In fiscal year 1970, the program reached 4.3 million people, at an annual federal cost of $550 million. By 1975, the program reached 17.1 million people, at a cost of $4.4 billion. (A third of this expansion resulted from phasing out commodity distribution.) About 80 per cent of the recipients are poor. (If the government were to count the net value of food stamps as income—which it doesn't—the official poverty count would be reduced by one sixth.)

Medicaid was passed by Congress in 1965 as Title 19 of the Social Security Act. Its purpose was to provide medical care to the non-aged poor (the elderly were covered by Medicare), but as with AFDC, most of the specifics of the program were left to the states. Today, every state except Arizona has a Medicaid program of some kind. In 26 states, coverage is restricted to AFDC and AFDC-U recipients. In the remaining states, some coverage is also extended to the medically indigent—families whose income (net of medical expenses) falls below a state-established threshold. The state programs also vary widely in the specific services they will reimburse. Altogether, the state programs serve a total of 25 million recipients, at a cost of $12 billion.

For an AFDC recipient, Medicaid operates in a straightforward fashion. Each month the recipient automatically receives a Medicaid card. If the recipient requires care that is covered by the program, he goes to a doctor or hospital and presents the card in lieu of payment. The doctor then bills a financial intermediary, like Blue Cross, which in turn bills the state government. If the recipient leaves AFDC because of increased earnings, he remains covered by Medicaid for four additional months. After 1965 AFDC became substantially more attractive, because it was tied to Medicaid in this fashion. There is thus reason to believe that Medicaid significantly accelerated the welfare explosion.

For someone not receiving AFDC, or someone who has exhausted post-AFDC Medicaid eligibility, coverage is more problematic. A state may not cover such persons at all. Where they are covered,

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eligibility must be established at the time of illness—there is no card provided in advance. In some cases it is possible to establish eligibility by incurring enough medical expenses to force net income below the eligibility threshold, but there may be a problem of paying for services in the meantime. The range of covered services for the medically indigent is often more restricted than the range of services for AFDC recipients in the same state. For all of these reasons, relinquishing Medicaid represents a real loss, and going off welfare poses a real risk.

Beyond the "big three," the federal government aids the poor through a number of secondary programs, including public housing, housing subsidies, free school lunches, legal assistance, scholarships for higher education, day care, and so on. Unlike the "big three," these secondary programs are often funded by fixed budgets that are too limited to serve more than a small fraction of eligible families.

What needs to be reformed?

Where has the system failed? The answer depends on whom you ask. Thoughtful people have been writing about AFDC for a number of years, and they have produced an exhausting and exhaustive catalogue of the system's faults. Nonetheless, some problems are more important than others, and there is general agreement that the new Administration will have to address itself to four major questions.

1. *How generous should the system be?* Twenty-six states pay a family of four cash benefits equal to less than two thirds of the federal poverty standard—i.e., less than $68 per week. Ten of these states pay a combination of cash benefits *and* food stamps totalling less than $68 per week. Twenty-four states have no AFDC-U program and thus simply deny federal cash benefits to two-parent households. Where AFDC-U does exist, it has a variety of eligibility restrictions that preclude some portion of the needy from receiving aid. Chief among these is the definition of an unemployed parent as someone who works fewer than 100 hours a month. Under this "100 hours rule," a family with a father who works more than 100 hours a month is ineligible for aid, even if family income falls below the needs standard.

At the same time, some critics—including those sympathetic to the poor—have suggested that benefits in some jurisdictions may be too great. The most direct statement of this problem was made

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by Blanche Bernstein, in a study of the New York City welfare system for the Subcommittee on Fiscal Policy, chaired by Congresswoman Martha Griffiths. Bernstein demonstrated how the City's standard benefits—AFDC, Medicaid, food stamps, and free school lunches—produced a package valued at $5,500. Because these benefits were tax-free, they were equivalent in value to a job with a gross annual pay of $7,000—far more than what could be gained from many of the City's low-skilled jobs.

2. *What work should be required of recipients?* AFDC is regularly criticized as a haven for cheaters and frauds. At times, these charges focus on actual violations of the law, such as nonreporting of income. But more often the claim is that some people on welfare could really work for a living if they had to, but prefer to avail themselves of substantial welfare benefits instead. This issue is complex because it is bound up with all kinds of value judgments. The evidence does show that a female AFDC recipient is more likely to work in a low-benefit state like Florida than in a higher-benefit state like Illinois. But if the work is that of a farm laborer at $1.50 per hour, is it good or bad that she should leave her children for such a job?

Despite these ambiguities, all writers on welfare reform have addressed the question of work, though in two different ways. One group, including almost all economists, advocates financial incentives to encourage welfare recipients to work. Ten years ago, they argued that AFDC discouraged work through the 100-per-cent tax. Today, economists like Henry Aaron argue that the 100-per-cent tax has in fact been recreated through the interaction of several benefit programs. Because a typical AFDC recipient receives food stamps, Medicaid, and perhaps other aid, a dollar of extra earnings can (under the "$30 and one-third" rule) reduce AFDC benefits by 67 cents, increase the cost of food stamps by another eight cents, increase public-housing rent by an additional amount, and so on —leading once again to a situation where a welfare recipient is no better off for having worked. There is a real question as to whether recipients make such marginal calculations, but in the extreme cases disincentives obviously exist. The clearest example, already mentioned, is the loss of Medicaid after leaving AFDC.

Although economists want to encourage work through incentives, a second group of reformers wants to mandate work through direct legislation. This group argues that low tax rates on earnings are weak incentives at best, and that provision of an adequate income is an invitation not to work. To offset that, reformers want to tie

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welfare benefits more strictly to work, at least for certain kinds of welfare families. This approach lay behind the 1971 Talmadge amendments that made the "work search" requirements in the WIN program more rigorous.

3. *Can the system be administered more efficiently?* The question of administrative efficiency has several aspects. One is how well program administrators now do their jobs. Television audiences in New York were recently enraged (though probably not surprised) to see two reporters with hidden cameras bribe a welfare worker to give them benefits for which they were ineligible. This episode came on the heels of revelations concerning massive fraud in the Medicaid program: Doctors and hospitals gave services far in excess of patient needs, and then billed the government for even more services than were delivered.

Another aspect of efficient administration involves the number of programs that now deliver aid. Many economists and government officials believe substantial savings could be achieved if the budgets for AFDC and in-kind programs like food stamps, free school lunches, public housing, and so on were all combined, and the benefits disbursed as cash.

Finally, there is the issue of target efficiency. Every welfare system distributes some money to persons less needy than others. This happens because of the need to preserve work incentives, because of loopholes in program legislation, because of the management failures cited above, or because of fraud. Progress in eliminating these inefficiencies would be beneficial both in terms of distributing the present welfare-benefits "pie" and in terms of the amount of transfers the public will be willing to support in the future.

4. *How should the system be financed?* The combined cost of food stamps, Medicaid, and AFDC is less than two per cent of GNP. Nonetheless, the distribution of that cost creates heavy fiscal burdens, particularly in some urban areas. The classic case is, of course, New York City, which has a large welfare population and bears about 23 per cent of its welfare costs. By national standards this is quite high; indeed, in only 14 other states do local governments contribute more than one per cent of AFDC and Medicaid costs, and in only four other states does the local contribution exceed 10 per cent. In those few states sharing the New York tradition of local contributions to AFDC and Medicaid, local welfare costs are frequently spread across a county base extending beyond fiscally pressed central cities. There is growing Congressional agreement that program costs should be shifted to higher levels of government.

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There are additional issues beyond these four questions. Some critics charge that the current system is too intrusive and that caseworkers exercise too much discretionary control over the lives of recipients. Others claim the system is too slow in responding to emergencies. Still others say the system abounds with inequities—the most obvious being the interstate differences in benefits and eligibility, although intrastate inequities exist as well. Congresswoman Griffiths' subcommittee made headlines in 1972 with its survey showing that certain welfare families received benefits from as many as six or seven programs (e.g., legal aid, school lunches, public housing, as well as food stamps and AFDC), while other welfare families in the same city benefited from only one or two. Another technical but important inequity arises from the operation of the "$30 and one-third" rule. For a family to become eligible for AFDC, its income must fall below the needs standard of the state. Only *after* establishing eligibility does the family qualify for the "$30 and one-third" deduction. With this deduction, the family income can rise above the initial needs standard, although the family continues to qualify for benefits. This creates the peculiar situation whereby two families may have identical current incomes, but one receives additional AFDC benefits (because it established eligibility in an earlier "bad" month) while the other does not.

What are the options?

Clearly, no new program can solve everything, if only because many of the problems have conflicting solutions. It is, for example, hard to imagine any new program that is both tougher on fraud and less intrusive into recipients' lives.

From the perspective of those concerned about fundamental human needs, the greatest failing of the welfare system lies in the inadequate benefits provided many dependents and the incomplete coverage of poor families with children. But it would be naive to assume that the issues of adequacy and coverage can be addressed in isolation. Since 1960, Congress has considered various welfare reforms on five different occasions. Each time, legislators were responding more to public concern over the rising number of recipients and the fiscal consequences of growth in the rolls than to the human suffering caused by Mississippi's $60 monthly benefit.

Recently, welfare reform has been in the news because the National Governors' Conference and Mayor Beame requested fiscal relief. Last fall, candidates on the stump, including the President,

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received their most enthusiastic applause when they talked about putting welfare recipients to work and rooting out fraud. In this climate, any liberal welfare reform must be based on exchanging an extension of benefits for a redistribution of costs and/or a toughening of work requirements. Three proposals for such a trade-off now appear to be under consideration.

The first and most widely discussed is a *Negative Income Tax* (NIT), which was first proposed in the 1940's and 1950's by several economists, including George Stigler and Milton Friedman. They argued that if society were committed to reducing poverty, the appropriate mechanism was a downward extension of the positive tax system, whereby those with substandard incomes would receive payments from the government—i.e., receive "negative taxes."

Compared to the AFDC system of that time, NIT offered several advantages. It would be open to all households—two-parent as well as female-headed—and so would not offer incentives for family disintegration. It would also be integrated with the Internal Revenue system. Under NIT, a dollar of earnings would not result in an equal loss of benefits. Work incentives would thus be restored to the welfare system.

Today, the partial acceptance of AFDC-U and the variations of the "$30 and one-third" rule have reduced these advantages. Nonetheless, Paul Samuelson, former HEW official Laurence Lynn, and other economists continue to argue for NIT, for a variety of reasons. They see NIT as a total replacement for all current welfare programs except Medicaid: AFDC, food stamps, housing supplements, and so on would all be abolished in favor of a single uniform cash payment, scaled to family size, with a tax rate on earned income below the current multiple-program rate. The consolidation of programs would reduce administrative costs, while the uniformity of the program would eliminate current inequities and inadequacies. As far as possible, recent advocates want the program run as Stigler and Friedman first conceived it—as an extension of the Internal Revenue Service. This would eliminate intrusive social workers. In exchange for all this, the federal government would assume the total cost of the program.

The second option is a *Two-Track Transfer System.* This term describes a variety of specific proposals, all of which emphasize separating poor families into those whose household heads are employable and those whose household heads are not. Whereas NIT tries to encourage work through a low tax on earnings, two-track options *mandate* work through threat of benefit withdrawal.

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Families without employable heads (families headed by a disabled person, and female-headed families with preschool children) would be put in a program similar to AFDC, with a federally funded minimum benefit. But employable family heads would be given job training coupled with low-level unemployment compensation, tied to a strict work test. If a recipient failed to take a job to which he was referred, the family benefits would be cut off. In some versions, the plan would include public-service employment to provide jobs of last resort to those unable to find work in the private sector.

The two-track work test allows circumvention of the central problem of NIT—what became known five years ago as "McGovern's Dilemma." If NIT is to have a substantial "guarantee" (the payment made to families with no other income) and a low tax rate to promote work, in many cases payments will be made to families having what appear to be astonishingly high incomes. To provide a simple example: A NIT system with a $5,000 base payment, a $100-per-month standard deduction for work expenses, and a 50-per-cent tax rate will cease making payments to families only when earnings exceed $11,200 per year. Although payments to non-poor families may be modest, many such families will receive them, because the number of families with children in the $5,000-to-$12,000 income range exceeds the number of families with children in the less-than-$5,000 range by 150 per cent. By contrast, a two-track system is free to impose high tax rates to insure target efficiency, even with a high guarantee, at the same time that the work incentive is preserved administratively, through the work test.

The proposals for two-track systems also include reform of the Unemployment Insurance Benefits (UIB) system, in particular the procedures now followed to grant extended benefits to jobless persons for periods in excess of normal coverage. The two-track procedures represent a method of imposing requirements on long-term UIB recipients similar to those imposed on welfare recipients. It is true that this change could be accomplished within the current UIB system itself; no "welfare reform" is required. Proponents are loath, however, to separate the UIB problem from other elements of the transfer system.

Two-track systems in one form or another have received the support of officials within the Department of Labor, as well as Eli Ginzberg and other manpower authorities. More recently, they were the topic of a Ford Foundation continuing seminar on welfare policy. The trade-off involved is this: In exchange for increasing

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the benefits in the poorest states and extending the benefits at some level to all families, the federal government would increasingly—and perhaps totally—assume the costs, as well as forcefully and publicly declare that malingerers on the AFDC and UIB rolls will not be tolerated.

The final option is tinkering, more eloquently described as *incremental reform*. Incremental reform requires working for one or more specific improvements in the current welfare system. The first item on the list is a federally mandated minimum benefit level in all states. The second is extending AFDC-U to all states. The third is liberalizing AFDC-U eligibility regulations, including dropping the 100-hours rule. The fourth is separating Medicaid eligibility from AFDC. In exchange for one or more of these, the federal government would offer to increase its share of program costs and, if deemed desirable, further strengthen the WIN program.

Variations on an incremental strategy are almost as old as AFDC itself. In 1969, Richard Nathan, then a Nixon aide, responded to a Presidential request to "do something about welfare" with a proposal that included the first two items. His proposal was briefly considered, but subsequently discarded in favor of the Family Assistance Plan.

It is somewhat unfair to call such changes incremental, since any of them would significantly change the existing system. Yet the changes are incremental because even if they were all adopted, many features of the current system would remain intact. Wide variations in state benefit levels would continue. Food stamps would remain as a separate program. Cumulative (from multiple programs) marginal tax rates on earnings of welfare recipients would remain high. Programs would continue to be administered by the states through local offices, with long eligibility checks, social workers, and so on. The fact that the changes can be described as increments to the existing system is a great advantage. To see why, it is useful to review a bit of history.

The political lessons of FAP

How should the President choose among his options for welfare reform? One obvious criterion is the probability of Congressional passage. No one would suggest that every plan managing to get through Congress is worthwhile. But it seems foolish to spend much time on programs with highly dubious political prospects.

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Fortunately, the President has some political experience to learn from: the history of the Family Assistance Plan (FAP). FAP, a program of the Nixon Administration, was the last serious attempt at national welfare reform. It was twice passed by the House of Representatives, in 1970 and 1971, and twice defeated in the Senate, largely through the actions of the Senate Finance Committee. By now, both the program and its history have been described in several good books by M. Kenneth Bowler, Vincent and Vee Burke, and Daniel Patrick Moynihan.

The defeat of FAP is often described in terms of political perfidy: The liberals, who should have supported it, did not; or the Administration introduced it, and then walked away from it. But the history in these books suggests a more systemic problem—the inability of the Administration to clarify the relationship of FAP to the existing welfare system. Without such clarification, the many vested interests of the welfare system could not know whether to support or oppose FAP.

President Nixon introduced FAP in a nationally televised speech in August 1969. The program he described was a kind of negative income tax (though he avoided that term), designed for families with children. Its maximum payment for a family of four was $1,600, and recipients would lose 50 cents of benefits for every dollar they earned over $50 per month. The program had certain overtones of a two-track system: There was to be a work test for employables, and some public-service jobs. But these were not the central focus of the program. Throughout his speech, President Nixon emphasized the way in which the universal, uniform FAP would replace the archaic AFDC system with a streamlined income-support program, whereby work would be profitable and encouraged.

In reality the proposal was—or soon became—more mundane. Early in the year, Administration analysts had considered proposing FAP as a replacement for AFDC. But by the August speech, officials agreed that AFDC recipients should not lose benefits under any reform. If a state paid AFDC benefits above FAP's payment, it would have to supplement FAP's payment to keep the level of benefits unchanged.

In practice then, FAP would have provided the first three items of incremental reform. In the poorest states, benefit levels would have been raised, and benefits would have been extended to two-parent families with children. But in a state like Illinois, little would have changed. The 100-hours rule on AFDC-U would have been

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eliminated. The federal government would have assumed a greater share of program costs. But the typical welfare recipient would not have noticed much difference.

Had the Administration presented FAP as a set of minimum standards, it just might have received smoother passage. But it described FAP as total welfare reform, and thereby made FAP vulnerable on a number of grounds.

Burke and Burke describe how Senator John Williams, a fiscal conservative, lectured the Senate Finance Committee on FAP's work disincentives. Using charts requisitioned from HEW, he showed how the interaction of tax rates on FAP, AFDC state supplements, food stamps, Medicaid, and public-housing benefits created extremely high cumulative tax rates on earned income and, in some cases, left recipients worse off as earnings increased. His points were well taken—but they could have applied equally well to the then-existing welfare system without FAP. Because FAP was purported to be a total welfare reform, however, conservative opponents could attack it for not curing all of the problems of welfare.

At the same time, liberals—including Senators Eugene McCarthy and Fred Harris, spokesmen from the National Council of Churches, and members of the National Welfare Rights Organization—attacked FAP because its annual payment of $1,600 was below the AFDC payment in more than half of the states. Some of this attack was disingenuous—it was known that the Administration wanted to mandate state supplements to FAP's payment, so that no welfare recipient would lose by the law. But some of the critics were honestly confused by the Administration's insistence on the uniform nature of its program. In President Nixon's August speech, the only reference to state supplementation was a phrase, inserted at the last minute, that no current welfare recipients would lose benefits. Even then the point remained unclear, and within 72 hours Administration spokesmen had to clarify it at a press conference. Over time, the issue came alive again, as the Administration backed away from its earlier position. When FAP was reintroduced in 1971, the language requiring state supplementation was ostentatiously missing from the bill, and this helped kill any remaining liberal interest in the plan.

We should not rely too heavily on hindsight. Given the then-existing hostility to the welfare explosion, it is remarkable that FAP's proposal to increase benefits in low-payment states progressed as far as it did. Nonetheless, it appears that the Nixon Administration underestimated the complexity of its political task. Welfare

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politics in the United States involves a delicate balance of interests: Russell Long, black welfare mothers in Los Angeles, mayors, governors, social workers, the United States Chamber of Commerce—the list is long. Even the most irrational features of the system benefit someone, and so every reform will arouse opposition.

Normally, one deals with a political opponent through compromise—or by outvoting him. In the case of welfare, a compromise strategy is problematic because the issues are so intense. Consider the level of benefits: How can a Congressman from Detroit or Baltimore be persuaded to vote for a national benefit level that might —or might seem to—cut his constituents' AFDC payments by 20 per cent? Conversely, how can a Congressman from the rural South be persuaded to support a proposal that would cause a sharp rise in the wages of low-skilled labor? Similarly, requiring welfare recipients to accept public-service employment attracts so much support because it is discussed in the abstract. But federal officials conceive of such jobs as paying something close to the minimum wage, while union officials expect remuneration to be set at prevailing wages. In many urban areas, the difference between minimum and prevailing wages for even routine jobs can be more than $8,000 per year. With the tight federal budget and municipal layoffs, it is hard to see a common ground.

If compromise cannot work, there remains the possibility of outvoting the opposition. But as the scope of reform grows larger, more and more interests will be adversely affected—and all the votes will move to the other side. This is what happened to FAP. By purporting to reform the entire welfare system at once, the Nixon Administration created an enormous list of opponents and guaranteed its defeat.

Earlier we suggested that any serious welfare-reform proposal must balance liberal and conservative elements—an extension of benefits together with a redistribution of costs or a toughening of work requirements. The lesson of FAP suggests something stronger: Those committed to improving the well-being of the poor must insure that the debate is confined to a narrow range of issues—in the language as well as the substance of the proposals. Any suggestion of "total welfare reform" will expose every aspect of the existing system to new debate, guaranteeing political stalemate. *If the President is seriously concerned with the adequacy of the current system, he is politically constrained to pursue an incremental strategy of trading mandated minimum standards and other reforms for greater federal assumption of costs and an expansion of WIN.*

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Moreover, all of this trading should be described in suitably modest language.

The system in Alameda County

An incremental strategy may improve the system somewhat and achieve a better distribution of costs, but what about the remaining problems—work incentives, administrative problems, fraud, inequities, intrusions into recipients' lives? These should be addressed serially, if at all, rather than attempting to solve them simultaneously.

The President should be cautious. Selling a new program is like selling a new car: In both cases it is useful to exaggerate the shortcomings of previous models. But although some of the remaining problems are serious, realism suggests that the negative-tax and two-track systems may not solve them—if only because these programs also have shortcomings that even the most prescient have yet to identify. Compared to textbook descriptions of comprehensive reform, the existing welfare system is a hopeless hodgepodge, the result of years of devious political compromise. According to a more charitable interpretation, however, the complexity of the system substantially reflects the complexity of the problems to which it is a response. In fact, some of these problems involve trade-offs that preclude their simultaneous solution. If proposals for comprehensive change are to receive serious consideration, they must come to grips with the same complications that confronted AFDC.

Consider as an illustration a system that exists not in HEW position papers or popular descriptions, but in a major urban area—Alameda County, California. The system there has a relatively generous AFDC program, including AFDC-U, and serves a major poverty area, Oakland. An incremental reform will not substantially increase the current level of benefits for recipients there, so Alameda County is as good a place as any to assess whether the proposed changes make for an acceptable compromise. If the details that follow seem mundane, remember that any social program has a day-to-day impact on the lives of individuals. Program reform is merely a change in the nature of the impact or a change in the people involved.

When an Oakland mother with three children wants to apply for AFDC, she comes to one of the seven welfare offices in the county. After being given a number, she must wait in a rather un-

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pleasant room until her number is called. She is then given a package of application forms, which she is told to take home and complete to the best of her ability. She is also told to return the next day for a group eligibility meeting, and to bring some positive identification for every member of the family, i.e., a birth certificate or a driver's license.

The AFDC application form is 12 pages long and requires detailed information concerning the composition of the family, the parentage of family members, the amount of income available, and the assets of the family, including automobiles, real estate, and other personal property valued in excess of $100 per item. If the woman has a job, she will also be asked to provide information about her work and transportation expenses, deductions for social security, and so on. In addition, she must fill out a five-page application for food stamps, which requires similar information.

The next day, in the group meeting, an eligibility worker (not a social worker) will help her finish any questions that she could not understand or answer. The worker will explain the regulations of the system, the right to appeal administrative decisions through a fair hearing, the responsibility to report immediately any change in earnings or family composition, and so on. After the meeting, the completed forms will be assigned to an "intake" worker, who will check them during the next seven days for missing information, and will phone the applicant if more information is required. Finally, an eligibility worker will visit the applicant at home to inspect living conditions, the welfare of the children, and so on.

This whole process usually takes about 15 days. In emergency situations the time can be reduced substantially, or aid can be provided through other channels. Eligibility will be determined according to whether the woman's income (net of work expenses and certain other deductions) is below the needs standard of the county ($420), and whether the total value of her assets (cars, furniture and other household goods, and real-estate equity) is less than the specified limits for each category ($1,500, market value, for cars; $1,000 in personal property; $20,000 in real estate). If she qualifies for welfare and has no other income, she will receive a biweekly check for $174. If she has other income, her check will be reduced accordingly. Unearned income (like child support from an absent father) will reduce the amount of the benefit check dollar for dollar. Earned income will reduce benefits according to the "$30 and one-third" rule. She will also receive authorization to buy a maximum of $166 dollars of food stamps per month, at a cost of $95. She will

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be given a Medicaid card entitling her family to free medical care and reduced prices on prescriptions.

Each month on welfare, the woman will be required to fill out a two-page WR-7 form to report any changes in family income or family composition. Failure to submit this form on time will first bring a warning letter, and eventually benefits will be suspended.

If all of her children are at least six years old, she will be required by the Talmadge amendments to register at the local state-employment-service office for job training and job placement under the WIN program. This registration is arranged automatically by the welfare department. Over time, a WIN service worker will encourage her to enter training, or to undertake a search for a job if she has none. In practice, at any one time, fewer than 10 per cent of AFDC families are receiving WIN or other employment services, and fewer than 17 per cent report earnings from work. All eligible recipients, save those who have just come onto the rolls, have been exposed to WIN services, but in some cases this amounts to merely an interview with an employment counselor.

If the recipient is not receiving these services, if she is not suspected of fraud, and if she is not having difficulties of some other kind, the WR-7 form will be her only contact with the system for one year: She will *not* be visited by a caseworker. At the end of the year, she will have to return to the welfare office and go through a complete reapplication process.

Now consider two-parent families who apply for AFDC-U. They must go through the same process, with two exceptions. If the father in the household is employed, he must work fewer than 100 hours per month. And regardless of the ages of his children or his employment status, the father must register for WIN services.

What will happen to these families over time? Suppose we define a "case closing" as occurring when a family leaves AFDC and remains off aid for at least a year. This definition is meant to exclude closings that involve moving from AFDC to, say, SSI, or closings where the family is off welfare for only a month or two before returning. On average, a single-parent family like the one described above will be on the rolls 44 months before its case closes by this definition. If the mother has more than a high-school education, her time on the rolls will shrink, on average, to 36 months. If she is currently working, her average time will be still less—18 months. If she has more than three children, or if she is black, or if she has fewer than 12 years of education, her expected time on welfare will expand to as many as 60 months.

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Movement off the AFDC-U rolls parallels movement off the AFDC rolls, with two exceptions. First, everything happens much more quickly under AFDC-U. Whereas a typical AFDC family might be on the rolls 44 months before its case is really closed, a typical AFDC-U family will be on the rolls only 12 months before leaving. Second, families on AFDC-U experience substantial rates of disintegration. If a typical AFDC-U case were followed for a year, the odds would be almost one in five that the family would move over to the AFDC rolls within that time. Over two years, the odds would rise to two in five. In some cases, this is because the father in the family is reclassified as disabled (which technically qualifies the family for AFDC, rather than AFDC-U). But in most cases, this shift occurs because the family splits up. This should not be surprising: Most families come onto welfare because they have serious problems. Providing aid can mitigate some of these problems, but it would be naive to anticipate eliminating all of them.

Four questions

Does the system in Alameda County need "reform"? As should be clear, reform has too many meanings for an unambiguous response. It is nonetheless useful to examine the system by confronting the four major questions now facing the President.

1. *How generous is the system?* If a family qualifies for aid, the amount of the AFDC grant plus food stamps and Medicaid substantially exceeds the federal poverty standard. Indeed, if Medicaid benefits are valued at either the average cost of services provided or the cost of a comparable health-insurance policy, the total annual benefit package exceeds $6,500. This may not be generous, but no current plan for comprehensive reform proposes a larger benefit.

The system is obviously not generous for poor, two-parent families made ineligible for AFDC by "overemployment" of adults. Such families are eligible for food stamps and perhaps limited medical assistance (under the medically-indigent provisions of Medicaid in California), but not for cash payments of any kind. These families are the working poor to whom any welfare reform proposal must, in part, be addressed.

2. *What work should be required of recipients?* The system is best described as schizophrenic: On the one hand, work is encouraged by WIN employment-search requirements, and support is provided for employment preparation, counseling, and training; on the other hand, there are three potentially serious work disincentives—Medic-

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aid eligibility, AFDC-U eligibility, and the high marginal tax rate on benefits.

For both AFDC and AFDC-U families, loss of Medicaid benefits is a significant barrier to leaving welfare. Families with children regularly need both normal and emergency health care. Possession of a Medicaid card frees such families from budgeting for normal care, and in the event of an emergency, care can be obtained quickly through established and accessible procedures. But a low-income, non-welfare family cannot get assistance in a medical emergency—a major operation for a child, for example—except through a lengthy process of establishing medical indigence. Hence a family leaving welfare subjects itself to considerably more uncertainty as well as considerably lower quality health care. This is surely a legitimate area for reform.

AFDC-U regulations automatically cut off aid to the families of men who work more than 100 hours per month on a regular basis, regardless of the wage earned. At the same time, an AFDC-U father is *required* to take a job only if it pays, after standard deductions for work expenses, more than his AFDC-U grant. *For men with large families, this provision can rule out any job paying less than $5.00 per hour.* Few entry-level positions pay this much, even though some offer excellent prospects of income advancement over time, once employment is established.

What common sense might suggest about the effects of these regulations is borne out by the data. Analysis of a sample of Alameda County recipients indicates that, all other things being equal, the likelihood of an AFDC-U case closing is inversely related to the number of children in the family. The data also indicate that tightening the definition of unemployment under AFDC-U (at one time families headed by men who were involuntarily employed fewer than 172 hours per month were eligible) has reduced the likelihood that jobs will be taken. The 100-hours rule and the first-job wage requirements thus seem to be good targets for reform.

The high cumulative tax rate on earnings results from the interaction among AFDC, food stamps, and other benefit programs. The typical families described earlier appeared relatively immobile: Once on welfare, they tended to remain for many months. An economist might speculate that their low mobility was caused by the high tax rate, which created a low incentive to take a job. But this speculation seems to be incorrect. Because of various administrative and court decisions over the past 10 years, California's AFDC system has had four different tax rates, including the old

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100-per-cent tax as well as a system under which the first $70 to $100 of the monthly earnings of most recipients were not taxed at all. Yet analysis of the data in California indicates that these tax-rate variations *had no impact* on the likelihood that an AFDC mother would take a job. Roughly similar findings about male-headed households emerged from the federally sponsored New Jersey Negative-Income-Tax experiment, in which sample households were assigned to negative-income-tax plans with a variety of different guarantee levels and tax rates. Analysis of the New Jersey data shows that variations in the tax rate had no significant impact on the hours worked by the household members.

All of these results are tentative and require further verification. Nonetheless, they suggest that reductions in the current AFDC tax rates on earnings are not a high-priority item for reform. This is especially the case because such reductions will substantially *increase* overall program costs by extending welfare eligibility further up the income distribution (recall McGovern's Dilemma).

3. *Can the system be administered more efficiently?* Perhaps. From the perspective of a recipient, an efficient system is one that delivers the benefits it is supposed to. In Alameda County, for each AFDC office there is a food stamp office in the same building. Case records show that all AFDC recipients receive Medicaid, while about 85 per cent receive food stamps. Recipient access to other programs—e.g., public housing—is more problematic.

From an administrative perspective, the minimal requirements for efficiency are that administrators be able to identify quickly the number and identities of people receiving aid, that reliable records of costs be maintained, and that control be exercised over the training and activity of eligibility workers and social workers. The Alameda County welfare system certainly meets all these requirements. At the same time, it probably tolerates a significant amount of fraud. The county maintains a fraud-inspection unit that primarily operates on two kinds of information: phone tips from recipients' neighbors, who call on a "welfare hotline" to report incidents of fraud; and cross-checks with the state tax system, whereby social security numbers of recipients are matched against those of workers whose taxes have been withheld by the state. Both sources reveal a significant amount of fraud, and about five per cent of the total number of cases are under investigation for fraud at any one time. But the fraud unit itself feels that it cannot uncover other kinds of fraud—the small amounts of unreported income, the AFDC-U father who "disappears" when he finds a job and "reappears"

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when he is unemployed, and so on. Whether the rate of welfare fraud is any different than the rate of tax fraud is unclear. Nonetheless, administrators believe that better control of fraud is a legitimate concern.

4. *How is the system financed?* In California, the non-federal share of the cost of the welfare system is divided between the counties and the state. Overall, the state pays about 33 per cent of AFDC costs, and the county picks up 17 per cent; the remaining portion is covered by Washington. California is atypical—it is a wealthy state, and both the county and the state could probably afford to pay more. Both would be delighted to pay less.

The existing system creates substantial incentives for the state, and at least modest incentives for the county, to be concerned about administrative efficiency. These financial incentives clearly affect administrative behavior and are backed up by the federal government through a regular system of audits, to assure state compliance with its regulations. However, in negotiations over welfare procedures, the federal government has few "sticks" with which to force efficiency; in the end, it is the financial incentives and the resulting local political pressures that seem to count in bringing about administrative improvements.

In addition to these four major areas, Alameda County's system has a number of secondary problems. About eight per cent of the Alameda caseload is in public housing; the rest of the families are not. The vacancy rate in the county's public housing is effectively zero, so one can assume that having a public-housing apartment is an advantage distributed arbitrarily among low-income families. Eliminating this inequity, however, requires phasing out public housing, or providing it to everyone, or adopting a different program—not "welfare reform." Similarly, about five per cent of AFDC recipients have gross incomes above the needs standard. They *remain* eligible for aid because of the "$30 and one-third" deduction; if they tried to *apply* for aid, they would be refused. It should be noted, however, that such inequities are usually of short duration, since anyone with income that high has an excellent probability of leaving AFDC in the near future. The "$30 and one-third" procedure was originally regarded by Congress as a transitional device, intended to help people work their way *off* welfare. In Alameda County, it does seem to do this. Where it does not—in cases where families remain on welfare, despite having an income in excess of need—it is frequently Medicaid that provides the disincentive for leaving AFDC.

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What is to be reformed (again)?

Few would say that the welfare system in Alameda County needs no improvement—least of all the administrators of the system. But little of the necessary improvement seems to require total welfare reform. It is worthwhile to sort the problems of Alameda County into four categories: problems that do not really exist (e.g., the routinely intrusive social worker), problems that could be solved through either incremental or total welfare reform, problems that can only be solved through total reform, and problems that cannot be solved at all, because we lack the knowledge to solve them.

The relative importance of these categories can be seen by supposing that the President succeeded in passing a Negative Income Tax. How would daily life in Alameda County be changed? NIT, modeled on the Internal Revenue Service, would be more remote administratively, and would make certain aspects of the welfare system more automatic. Recipients would no longer have to wait for eligibility examinations. There would be no more multiple applications required for AFDC, food stamps, and other programs. Recipients would cease to have even limited contact with social workers.

If NIT were a true replacement for AFDC, then both county benefit levels and the current tax rate on recipient earnings would probably be lowered. If (as is more likely) NIT were supplemented by AFDC (as FAP was supposed to be), both benefit levels and the tax rate would remain unchanged. In either case, full program benefits would be extended to those working-poor families now excluded from AFDC-U. In addition, certain small inequities—the uneven distribution of public housing, for example—would somehow be eliminated.

But these improvements in efficiency and equity would be at the expense of other program goals. The new system would be less responsive to recipients in financial emergencies. Most allowances for exceptional needs of families would be lost. Moreover, by its remoteness, the new system would be more vulnerable to recipient abuse.

Most of these changes would be modest. The daily life of a current AFDC recipient would largely remain unchanged, because *welfare as it now operates in Alameda County is already a kind of Negative Income Tax.* It covers most poor female-headed households, it pays a fairly decent benefit level, and it is not particularly intrusive. True, the tax rate on earnings is high, but this seems to have little effect on work effort. The greatest work disincentive of

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the system—the relationship between welfare and Medicaid—is typically not addressed in NIT proposals. The greatest virtue of NIT —extending aid to the working poor—can be obtained by extending AFDC-U, and does not require a new national program.

A similar conclusion results from comparing the current system in Alameda County with any of the two-track proposals. Little would be changed under a two-track arrangement, because the combination of WIN and AFDC has already produced a kind of two-track system. The current system does not place heavy formal emphasis on separating employable and unemployable families, but this is as it should be. Because both tracks are given income support from the same building, the system is flexible enough to deal with the frequent changes in family composition by simply relabeling the case folder—a "flip-flop," in county parlance. If employables and unemployables were serviced in truly separate programs, such transfers would be much harder.

Supporters of two-track systems may object that the current WIN program is insufficiently energetic in providing recipients with jobs. To an extent, the slow (but increasing) rate of job placement under WIN arises from identifiable causes with specific remedies: the requirement for high entry-level wages, the low program budget that limits the number of training slots, and the difficulty in coordinating WIN with other training activities. More generally, the program may be weak because we do not know all that much about how to train unskilled people for available jobs. But if the problem results from a failure of knowledge, a national two-track system based on the same knowledge will be of no help.

Failures of knowledge bring us to the fourth category of problems—those that we do not know how to solve. They occur throughout the welfare system, and impose serious constraints on what the President can hope to accomplish. Two recent examples illustrate the point. The new welfare commissioner of New York City, an executive on leave from an insurance company, was quoted by the *New York Times* (October 30, 1976) as rejecting a program of semi-annual caseworker visits to recipients' homes. He acknowledged that such visits would cut down fraud, and admitted that reducing fraud was a high public priority. But he rejected the program because he felt that certain of the City neighborhoods were too unsafe for caseworkers to enter—a real and dangerous situation. It is not clear how such a problem would become easier to solve if it were passed on to the Internal Revenue Service or the Department of Health, Education, and Welfare as part of a total "reform."

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On November 18, 1976, the General Accounting Office (GAO) released a highly critical report on the Supplemental-Security-Income program, which represented a partial federal takeover—a "reform"—of state-operated programs for the aged, blind, and disabled. Since its inception in 1971, the program has been charged with delays in disbursing checks, and other administrative inefficiencies. To these charges, the GAO added the results of a survey showing that significant numbers of recipients had unreported incomes (including income from other federal programs), which made them ineligible for all or part of their benefits. The GAO estimated that had benefits been calculated properly, the program budget would have been reduced by $56 million.

These recent anecdotes, the description of the Alameda County system, and the political history of FAP lead to a single conclusion: The uniform, efficient welfare system of the economic textbooks is nothing but a mirage. Even the most comprehensive welfare reform will leave a system with many of the current problems, and much of the current public unhappiness. Plans for complete reform are distinguished not so much by the improvements they produce as by the risks they entail—most notably, the risk of political stalemate that will preclude any welfare reform for at least the rest of the decade.

Rather than pursue comprehensive reform, the President can present Congress with a program for incremental reforms: a minimum level of AFDC benefits; an extension of AFDC-U to all states; the relaxation of AFDC-U eligibility rules; and the untying of Medicaid from AFDC. If all these reforms were passed, the result would approximate a comprehensive welfare reform in most respects. But the individual proposals do not have to rise or fall together. The President can push for as many as the public will encourage and the budget will permit. And because the proposals work within the existing AFDC system, the President's political strategy can develop without raising the thorniest questions of total welfare reform: the appropriate level for a uniform national benefit, the ways in which marginal tax rates on earnings should be lowered, and so on.

Some will call the proposed measures only half a loaf. But in the welfare system as it now stands, this is certainly better than no bread at all. Given the uncertainties surrounding the outlook for and consequences of more dramatic proposals, a solid half loaf can be viewed as a real accomplishment.

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Facing the social security crisis

MARTIN FELDSTEIN

CRIES of concern about the current deficit and the long-run financial soundness of the social-security system have become increasingly prominent in the daily press. Congress has held hearings and appointed a special panel of experts to recommend changes in the benefits and financing. The administration's trustees have issued a firm warning about the financial problems that lie ahead, and former President Gerald Ford responded by proposing an immediate $4-billion increase in the payroll tax and a major new study of the long-run development of social security.

All of this concern is more than justified by the problems now facing social security. Important changes must be made to protect the program's survival. Dealing with these pressing problems will also provide an opportunity to strengthen and reform social security so that it can better serve our nation in the years ahead.

Current and future deficits

The social-security program is currently running a deficit and depleting its small reserve fund. In 1970, the trust funds were equal to 15 months' worth of benefits. Now there are only eight months of benefits left. Experts warn that continuing on the current course will

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lead to an accelerating rate of depletion of the present fund; if the current legislation is not changed, the trust fund will be exhausted by the early 1980's.

The projected deficit also reflects the method of adjusting benefits for inflation that was introduced in 1972. While adjusting benefits for changes in the cost of living is clearly a good idea, all experts agree that the method now in use is technically wrong. It makes real benefits and taxes hypersensitive to inflation.[1] This error must be corrected before people come to believe that they are entitled to impossible benefits. Since the future of social security is unthinkable without this change, in what follows I will assume that the current method of indexing will soon be corrected.

There is, however, an important long-run financial problem that remains even if the indexing is corrected to neutralize the effects of inflation. The recent demographic swing from "baby boom" to "baby slump" will eventually require a very large increase in the social-security-tax rate if no corrective action is taken. The dramatic fall in the birth rate will reduce the relative number of workers in the future when the number of retirees is very high. Today there are 30 retirees per 100 workers. Forty years from now, there will be 45 retirees per 100 workers, an increase of 50 per cent. If the current pattern of benefit-replacement ratios (i.e., the ratio of benefits to previous earnings) is to be maintained, the tax rate would also have to rise by 50 per cent, to 16 or 17 per cent. If productivity growth is less than the two per cent currently anticipated, the tax rate would have to rise even further.

At a minimum, such an increase would prevent raising tax revenue for other important purposes. And added to the current marginal tax rates of more than 30 per cent already paid by families earning $10,000 to $15,000, this extra tax could have substantial disincentive effects.

Although there has been much concern about its unfunded liability of more than $4 trillion, there is no *economic* reason why social security should ever be bankrupt. Current beneficiaries and covered workers *are* expected to receive over $4 trillion more in benefits than

[1] Under current legislation, the benefits to which a new retiree is entitled depend on both his average earnings during his working life and the level of prices at the time of his retirement. An increase in the rate of inflation during the next 20 years would raise both the average lifetime earnings of someone who retires in 1996 and the level of the consumer price index in that year. Because both of these raise his initial benefit level, the problem is described as "double indexing." Even an inflation rate of five per cent would cause many retirees to receive benefits substantially greater than their previous earnings.

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they are expected to pay in future taxes. If social security were a private pension program, it would require current assets of more than $4 trillion to be financially solvent, i.e., to guarantee its ability to meet its future obligations. Since the social-security program has a trust fund of only $44 billion, or some one per cent of its obligations, social security is bankrupt by the conventional standards used to determine the actuarial soundness of private pension programs. Comparing social security to private pension programs, however, is totally misleading. A private pension program must have sufficient assets to meet all prior commitments because it cannot be certain that any future contributions will be made. In contrast, the government can continue to compel future generations of workers to pay social-security taxes. The future tax rates can be set so that revenues are sufficient to meet the claims of the beneficiaries. The government's power to tax is its power to meet the obligations of social security to future beneficiaries.

As long as the voters support the social-security system, it will be able to pay the benefits that it promises. It is therefore very important to prevent an increase in the tax rate or other changes that will undermine public support of the primary purpose of the system: providing basic income-related annuities that individuals otherwise could not or would not buy for themselves. Maintaining political support will become even more difficult because of the problem to which I now turn.

The falling "rate of return"

Current retirees receive on average more in social-security benefits than they (and their employers) paid in taxes during their working years. This excess of benefits over lifetime taxes is equivalent to earning a very high rate of return on the taxes paid. Unfortunately, this implicit rate of return will fall sharply in the future, so that social security will provide a much lower rate of return than private investments.

A private pension program can give a retiree more in benefits than he previously paid in contributions because it invests in stocks and bonds that pay interest on the individual's contribution. Over the past 25 years, the real annual yield (after adjusting for inflation) was eight per cent for common stocks and three per cent for corporate bonds. A conservative portfolio with half of each would have yielded more than five per cent to the private pension and its beneficiaries.

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Social security can pay more in benefits than the retirees previously paid in taxes for a very different reason. Social security does not invest tax receipts and therefore does not earn real interest or dividends as a private pension plan does. Instead, these tax receipts are paid out to current retirees. The secret of the ability of social security to pay back more in benefits is the growth of the social-security-tax revenues.

Those who are retired today get more in benefits than they paid in taxes because the current social-security-tax base of more than $650 billion and the 9.9 per cent tax rate are much greater in real value than they were when the current retirees were working. The rapid growth of real social-security-tax receipts that has permitted the high rate of return on social-security taxes has four separate sources.

1. Average weekly earnings before tax have grown during the past 25 years at an annual rate of 1.3 per cent, after adjusting for inflation. If we disregard the recession of 1974 and 1975, the 23-year growth rate was 1.7 per cent.

2. The population over age 16 grew at 1.4 per cent per year and the labor-force-participation rate rose slightly.

3. The coverage of social security was extended to include new industries, the self-employed, and other categories originally excluded.

4. The tax rate was increased from two per cent between 1937 and 1949 to 9.9 per cent today (with an additional 1.8 per cent for the health benefits) to finance higher benefits as well as benefits for the disabled, survivors, etc.

As a result of these four changes, real social-security-tax receipts (excluding the health portion) rose at an annual rate of 10.4 per cent during the past 25 years, after eliminating the effect of inflation. Stated somewhat differently, these social-security taxes were 1.4 per cent of total wages and salaries in 1950 but 7.9 per cent in 1975, a more than fivefold increase. It was this very rapid growth of tax receipts that made it possible for social security to offer such a "good deal" to participants.

Although real wage rates will continue to rise in the future, none of the other sources of growth of social-security tax revenue can continue as they have in the past. There has already been a dramatic drop in the birth rate, which is currently not sufficient to maintain a constant size of the population. Moreover, the new technology of birth control and the new opportunities for women to work outside the home represent permanent changes that will depress the birth rate even if a change in tastes and attitudes about fam-

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ily size induces some to have larger families. The official government actuaries regard as optimistic a forecast based on the assumption that the birth rate will rise enough to keep the population from shrinking. Thus population growth will not be a sustained source of growth for social-security contributions in the future.

The coverage of social security is now almost universal. Although extension of social security to federal government employees and certain state and local employees who do not now participate would be desirable, it would not add significantly to the growth of the tax base.

Finally, there is no way the tax rate can continue to increase to provide richer benefits as it did in the past—a fivefold increase from two per cent to 10 per cent in 25 years. Indeed, even to maintain the current pattern of replacement rates would require an increase of more than 15 per cent.

When the tax rate and the population have stabilized, the only source of growth will be the rise in real wage rates. *With the full maturity of the social-security system, the "rate of return" that participants will earn on their social-security contributions will be limited to the growth rate of real wages, at most about two per cent per year.*

High benefits and forced retirement

A man who retires in 1976 and who always had median earnings (now about $8,500 a year) will receive benefits equal to 46 per cent of his gross annual pre-retirement earnings. If he has a dependent wife, he will receive half again as much, or a total of 69 per cent of his previous maximum gross earnings. Based on $8,500, benefits would thus be $5,865. But the social-security benefits are untaxed, while the earnings are subject to federal and state income taxes and social-security taxes. Since the social-security tax alone would be $500, a conservative estimate of the total tax liability would be $1,000. Therefore the $5,865 of cash benefits actually replace 78 per cent of the previous net earnings of $7,500. In addition, the beneficiaries also receive Medicare benefits worth more than $1,000 per aged couple. In short, for those with middle-level earnings, retirement on social security now brings little decline in their standard of living.

Because the benefit schedule is progressive, someone whose earnings were below the median would have an even higher replacement ratio. Many of those with below-average earnings can now

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have a higher standard of living after they retire than they ever did when they were still working.

The high social-security replacement ratios are often supplemented by private pensions. In considering the future of social security, it is important to remember that private pension coverage, including the pensions of government employees, has grown rapidly and now covers at least two thirds of American employees. The percentage is even higher if part-time workers and persons under age 25 are excluded. The pension reform law recently enacted was designed to protect these benefits by regulating the vesting of pension rights, the establishment of funding obligations, etc. It would not be too much of an exaggeration to say that every employee who can expect to benefit from social security is also covered directly or indirectly by a private pension plan. Most of the employees not covered by private pension plans are low-wage workers who in old age will be supported by the new means-tested Supplemental-Security-Income program rather than by earned social-security benefits, or are wives whose husbands are covered by private pension plans.

The resulting high replacement ratios at retirement are quite inappropriate for middle- and higher-income couples. Recall that these high replacement ratios mean that the typical retiree receives from social security alone more than he was able to earn in his 30's, 40's, and 50's—when he had children to support, a mortgage to pay, and other expenses.

It is ironic and sad that social security forces many families to cut their spending even when their income is low and their responsibilities are great, in order to have more to spend during retirement when their income is already as high as it has ever been. Reducing the high replacement ratios currently planned for those who will retire at the turn of the century would permit a welcome reduction in the tax rate—or, at least, would reduce the size of the increase needed to offset the demographic change.

It is the rare man who continues to work when he can get more in social-security benefits than he can earn by continued work. But even those who can expect less than 100 per cent replacement of lost net earnings will often find that the relatively high level of benefits and the small extra income that would result from work make continued work too unattractive. In 1929, 55 per cent of men over age 65 were still working, while now less than 25 per cent continue to work.

Why is such induced retirement a bad thing? Because individuals are forced to contribute to social security throughout their

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working life and then to forego the benefits to which they are entitled if they do not retire. The strong incentive makes them decide to retire, but they would often be happier if they could have somewhat reduced benefits without retirement, or could exchange a lower tax rate for later retirement, or later retirement for a higher level of benefits.

The effects on capital accumulation

For most Americans, the social-security program is the major form of saving. With social security, it is possible to do little or no saving through bank accounts or private pension plans and still have a high standard of consumption during retirement. Because individuals substitute social security for such private saving, total private saving and private capital accumulation are reduced. Because of our current pay-as-you-go method of financing social security, the tax receipts are paid out as concurrent benefits and are not accumulated. There is no real investment of social-security benefits to offset the reduction in private saving and investment. The result is a fall in our nation's rate of saving and in our capital stock.

I believe this fall in saving is very large. The 1975 social-security-tax payments of more than $75 billion were nearly as high as the $90 billion of personal saving. The fall in our current capital stock may exceed $1 trillion, or a reduction of more than 25 per cent.[2]

With less capital, there is a lower level of productivity, lower wages, and fewer good jobs. By reducing private saving through social security, the nation denies itself the opportunity to invest at a rate of return of 12 per cent,[3] limiting itself to the implicit return of only two per cent that social security will provide in the future.

Five recommendations

Against this background summary of the problems facing social security, let me turn to a set of five basic recommendations.

1. *Raise the tax rate within three years to eliminate the short-run*

[2] In a previous article in *The Public Interest* ("Toward a Reform of Social Security," Summer 1975) I discussed the effect of social security on private saving and the evidence that the current capital stock may, because of social security, be $1 trillion less than it otherwise would be. See also my more technical survey of the evidence on this issue in "Social Security and Savings," *American Economic Review* (May 1976).

[3] The nation earns approximately 12 per cent on corporate investment even though, because of corporate and personal income taxes, individual investors receive substantially less.

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deficit. There is no need for an immediate increase, but failure to raise rates within three years is likely to precipitate a crisis that would greatly undermine confidence in the system. Whenever the increase occurs, other tax policy could be coordinated to prevent an undesirable macroeconomic effect or a change in the distribution of the total tax burden.

The alternative approach of raising more revenue by increasing the maximum taxable earnings should not be used. The maximum taxable earnings of $16,500 now exceed the earnings of 85 per cent of covered workers. The current plan is to increase the maximum taxable earnings as wage rates rise, but to maintain the same 85-per-cent ratio. There are occasional suggestions that this ceiling should be raised faster as a way of generating extra revenue for the social-security program. Although some extra revenue would result, most of it would eventually be lost because of the higher benefits that would be paid. More important, the extra revenue is small when compared to the disadvantages. Almost all of the extra revenue can be expected to come out of savings, thus further reducing our nation's rate of investment. This foregoes the chance for high-yield real investment (which itself generates substantial corporate income taxes), obtaining instead the low "return" provided by social security. Raising the maximum taxable earnings from $16,500 to $18,900 would cover 90 per cent of wages but would reduce saving by as much as $3.5 billion.

The *long-run* financial problem that results from the changing demographic structure of the population could also be dealt with by increasing the tax rate from the current 11.7 per cent to somewhere between 18 per cent and 20 per cent. Such an increase would be undesirable and is in fact unnecessary.

2. *Index the benefit formula so that future benefits and replacement rates depend on real and not relative income.* It has always been a principle of social security that individuals with higher average lifetime earnings and contributions should receive higher benefits. It has also been a principle that the replacement ratio (i.e., the ratio of benefits to pre-retirement earnings) should decline with income. As I noted above, a retiree with a dependent wife who has always had median earnings (now $8,500) will get benefits that replace 69 per cent of his previous gross wage. In contrast, someone who has always had maximum earnings (now $15,300) will get less, about 45 per cent including the dependent's benefit.

Thirty years from now, a man who has had median earnings all his life will be earning about $15,500 (measured in the prices of

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1976). I believe that with this increased income it would not be appropriate to continue the 69-per-cent replacement rate currently given the median worker with a dependent. This would produce a benefit of nearly $11,000. It would be better to recognize that a lower replacement rate is appropriate at that higher real income. Using the benefits that prevail today would imply the 45-per-cent replacement rate currently used for someone with that income level, or tax-free benefits of $7,000 a year.

It is important to understand that real benefits would continue to grow under both the "real-income" method of adjustment that I favor and the "relative-income" method contained in the current social-security law. The basic difference is whether, as real incomes rise, the average replacement *ratio* remains as high as it is today or falls gradually to a lower level at which it would then remain. Whatever the final distribution of replacement *ratios,* the actual level of real benefits could continue to grow in a way that keeps pace with the growth of real income. As the example in the previous paragraphs indicates, if we keep the current benefit schedule and adjust only for changes in the price level, the benefit-replacement ratio for a married retiree with median earnings would fall from 69 per cent today to 45 per cent 30 years from now, but real benefits (in 1976 dollars) would rise from $5,800 to $7,000. After the 30 years, the replacement rate would no longer decline and benefits would grow with the level of real income.

This method of "real-benefit indexing" was advocated by the official Consultant Panel on Social Security that recently reported to the Senate Finance and House Ways and Means Committees. It estimated that this way of dealing with the "double-indexing" problem can eliminate most of the five-to-eight-percentage-point rise in the tax rate that would otherwise be needed to deal with the coming demographic bulge. This is because the average replacement ratio falls during several decades while the ratio of retirees to workers is increasing. The lower replacement ratio and the higher demographic dependency ratio then stabilize together.[4]

Eliminating the current double indexing in this way not only solves many of the financial problems caused by the changing demography but has other advantages as well. It responds appropriately to the reduced rate of return discussed above by reducing the amount that individuals would otherwise be forced to "invest" at

[4] This picture of synchronized offsetting effects is more sanguine than the reality. Some tax increase would eventually be needed even if this method were adopted immediately.

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that rate. It eliminates the anomaly by which benefits can exceed previous net earnings and ends the situation in which individuals are forced to pay taxes when their incomes are low to support a more generous standard of living later. Reducing the average replacement ratio for the next generation of retirees will provide a greater incentive for the private saving that leads to national capital accumulation. The widespread coverage by private pensions and their regulation under federal law imply that individuals will have an opportunity to supplement social security in a safe and productive way.

3. *Develop a larger social-security capital fund.*[5] Indexing to make future benefits depend on real income will not in itself completely eliminate the need for increased tax rates in the future when the ratio of retirees to workers is substantially higher. We are therefore asking the next generation to pay an increased rate of tax to support us as retirees even as the whole social-security program becomes less of a "good deal" for them than it has been for us. Such an unfair shifting of the tax burden to the next generation clearly runs the risk that they will refuse to pay. If they do, the level of benefits will be lower than future retirees currently expect.

To prevent this, we should raise taxes during the next decade by more than is required to meet the concurrent benefit obligations. This would provide a surplus that could be accumulated in anticipation of the demographic bulge ahead. A two-per-cent addition to the tax rate would produce about $15 billion a year at current income levels. The income of this fund would be available to pay for the extra benefits when the demographic structure changes.

Such a capital fund would be desirable for other reasons as well. By using the added fund to buy outstanding government debt, social security would add to the nation's rate of saving and real capital accumulation.[6] Because social security is seen as a social alternative to private savings, it is politically appropriate that such a fund be accumulated by social security. Since the real yield that society earned on such a fund would exceed the two-per-cent "rate of return" available in a mature social-security system, it is an efficient way to finance future benefits.

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[5] I have discussed this idea of a social-security fund much more fully in "The Social Security Fund and National Capital Accumulation" in *Funding Pensions,* Federal Reserve Bank of Boston (1977).

[6] Buying *outstanding* government debt adds to the national rate of saving because the private individuals who originally sold their government bonds to the social-security fund will invest the proceeds in private bonds and stocks. This additional demand for private securities will increase the funds available for private investment.

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4. *Raise Supplemental-Security-Income benefits.* The prevention of poverty in old age was dramatically changed in 1972 by the introduction of the Supplemental-Security-Income (SSI) program. Unlike social security, SSI provides benefits only to those who show that they have very little other income. In fiscal year 1975, SSI paid $5.5 billion to these very poor older Americans. These benefits are financed from general revenue and not by the social-security payroll tax.

The standard of SSI benefits is still very low, less than $3,000 a year for a couple and less than $2,000 for an individual. I believe we should spend more to eradicate the poverty of these older people. The danger of an adverse effect on work incentives is obviously less than it would be for younger people of working age. Moreover, an important source of the problem of poverty in old age was the failure to adjust benefits for inflation before 1972. It would be particularly worthwhile to raise SSI eligibility levels for those who suffered substantially from the inflation in the decade before 1972: older retirees over 75 and women widowed many years ago.

5. *Tighten the relation of benefits to previous contributions.* Most Americans regard their so-called social-security "contribution" as a tax that entitles them to receive future benefits but that is not at all closely related to the amount of those benefits. When a man or woman earns $5 an hour and has a take-home pay of $4 an hour, he regards the difference as a tax and doesn't take into account the nearly 60 cents "contributed" to social security. With the current treatment of working wives and dependent wives, with the retirement earnings test, with the progressivity of the benefit schedule, and with the imperfect indexing and the disregard of the timing of contributions, these employees are quite right to view social security as essentially a tax.

That perception and the reality it represents is unfortunate. It makes the social-security "tax" a very important source of work disincentive. For most families, the social-security tax is more than the personal income tax. This 12-per-cent tax on top of federal and state income taxes moves the marginal tax rate from one fifth of additional earnings to one third. And when taxes take one third of extra earnings, there is bound to be an effect on such things as work effort, job choice, and the willingness to get additional training or to relocate.

In addition to these adverse incentives, the weak connection of benefits and taxes creates a sense of unfairness that can undermine support of the entire program. Many working wives pay social-se-

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curity taxes all their lives but receive nothing more in benefits than they would if they had not worked. Both men and women are disturbed that they cannot receive the benefits for which they have contributed because they want to keep working. And who would not be annoyed to think about the abuses caused by exempting civil-service salaries from social security? Federal government workers and many employees of state and local governments can pay no social-security tax, retire on a generous government pension, and also receive social-security benefits as a dependent spouse. Alternatively, government workers can also do a very small amount of work in private employment—a weekend job, self-employed labor, or work after early retirement from the government—and receive disproportionately high social-security benefits for themselves and their dependents.

The benefits problem

The failure to relate benefits more closely to previous contributions is thus a source of inequity and distorted incentives. Three basic reforms can end these problems: 1) End the discrimination against two-earner families; 2) do not penalize anyone for continued work after age 65; and 3) set individual benefits by accumulating individual contributions. Each of these deserves more comment.

Recall first that more than half of married women now work. The labor-force-participation rate of married women has more than tripled from the 14 per cent who worked in 1940. The treatment of working wives and dependent spouses under social security was designed for the very different conditions that prevailed in the past. Today it would be much more appropriate to recognize the importance of two-earner families. There are several different techniques that deserve careful consideration, e.g., combining the taxes paid by husband and wife and paying benefits on the basis of this total, or splitting the taxes paid between the husband and wife so that each accumulates an account.

One of the most frequent complaints of older people is that they are forced to retire in order to get benefits. In a society in which most retirement is voluntary, this is seen as unfair and is in fact a misuse of resources. Individuals who would prefer to work until 70 are forced both to pay taxes and to forego benefits if they continue working, or to retire earlier than they would otherwise. Several remedies exist: Eliminate the earnings test completely, increase benefits actuarially with late retirement, or provide some benefits

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to everyone at age 65. The argument that these could not be done because they are "too expensive" is not valid. Such estimates of the "cost" focus on the payment of extra social-security benefits and ignore the gain in federal-income-tax receipts and in personal net income.

The sense of unfairness and the economic distortions that result from the current method of calculating benefits would be eliminated if each individual or couple had a separate account in which contributions expressed in dollars of constant purchasing power were accumulated with a two-per-cent rate of return and used to finance an annuity at age 65 as well as life insurance that provides survivors' annuities. The crucial aspect is making everyone's account separate and self-contained. Eliminating redistribution from the calculation of social-security benefits should make people see clearly that their contributions are not taxes but forced saving.

Some readers will object that eliminating redistribution from social security runs counter to the desirable principle that taxes and transfers should be progressive. Indeed even the current social-security payroll tax has been criticized because, unlike the personal income tax, it is not progressive but proportional up to a limit (now $16,500), and then ceases. It is, however, inappropriate to focus on this single tax instead of seeing it in the context of the entire fiscal system. It is irrelevant that social-security taxes on middle- and upper-income families are not higher since the federal personal-income-tax rates can be adjusted to achieve any overall degree of progressivity for middle- and upper-income taxpayers. Similarly, the new refundable "earned income credit" in the personal income tax is designed to offset the payroll tax paid by low-income families with children. This refundable credit can be extended to all low-income persons to relieve the burden of the payroll tax to whatever extent is desired.

* * *

It is important to remember that the basic features of our current social-security program were designed 40 years ago under very different economic and social conditions. The current and long-run financial problems of social security should be solved by revising the structure of the program to make it appropriate for the economic conditions of the future. Only if our loyalty focuses on the purpose of social security rather than the details of its current form can the system be revised and updated to strengthen its good features, while reducing or eliminating its harmful effects.

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School desegregation and the limits of legalism

DAVID L. KIRP

THE courts today are almost alone in making and implementing school desegregation policy. Although by now this has become almost axiomatic, things were quite different a decade ago. During the mid-1960's, Congress, the executive branch, and the courts acted in concert, exercising extraordinarily effective leadership. That joint effort began to collapse when the Supreme Court expanded both the constitutional meaning of *de jure* segregation and the scope of what school districts were required to do in rectifying this wrong. As desegregation spread nationwide, and increasingly took the politically menacing form of "forced busing," the executive branch and Congress first withdrew from and then sought to undermine what had become an almost exclusively judicial effort. Today, desegregation is a matter of rule-mindedness, obedience to (or defiance of) court decisions.

The courts are now at loggerheads with Congress and the Executive, and this persisting tension has worked to no one's advantage. The vigor of court action has outstripped the judiciary's willingness to offer principled justifications for its rulings. As a consequence, the great constitutional principles underlying the *Brown* decision seem destined to be forgotten amid the tangled legalisms that have

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emerged as ostensible elaborations of the equal-protection clause. For their part, Congress and the Executive have declared only their opposition to the busing of schoolchildren. What they support, what political meaning they would attribute to the phrase "racial justice" and what process they would set in motion to attain that end, remains unknown. Among school districts, where policy consequences are most acutely felt, the constitutional obligation to desegregate seems selectively imposed, with neither a clear rationale nor much tangible help from Washington in intelligently addressing the challenges presented by desegregation.

These contemporary developments have gone largely undiscussed; yet they need to be understood, not to criticize from the vantage of hindsight but rather to make sense of the present. Questions of race and schooling are awesome in their complexity; they necessarily have political, educational, and ethical as well as constitutional dimensions, and for that reason entwine all of the branches of the federal government, not just the judiciary, in their resolution. But the diverse characteristics of the problem require attending to local and idiosyncratic as well as national and uniform circumstances. Is there any way to bring the coordinate branches of government—state and local as well as federal—once again into a semblance of harmony?

The changing nature of the issue

In the early 1960's, the rightness of *some* federal response to the problems of racial discrimination generally, and school desegregation in particular, was clear. The essentially moral character of the race issue emerged vividly in the bloody Birmingham police assault on those who marched with Reverend Martin Luther King, Jr. Almost overnight, Gunnar Myrdal's "American dilemma" was transformed into an American disgrace. Opinion polls reported the change: The hopes of the civil-rights movement had apparently become the Northern consensus; to do nothing was unthinkable. With respect to school desegregation, the merest glance at racial statistics suggested that only the federal government could give practical effect to the constitutional insistence that black children not suffer discrimination. Whatever the Supreme Court had meant by "all deliberate speed," the desegregation of just two per cent of all black students in the Deep South could not be reconciled with *Brown*. Title VI of the 1964 Civil Rights Act, a straightforward declaration that nondiscrimination in public schools receiving fed-

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eral financial support represented the will of the legislature, coupled with a commitment by the executive branch to implement that declaration, was precisely appropriate.

A great deal has changed since 1964. Some of that change, of course, had to do with political shifts. Nixon's "Southern strategy" and Ford's cautiousness differed in kind from Johnson's commitment to desegregation. At another level, the enthusiasm of the early desegregation advocates in HEW and the Justice Department has given way to far more limited federal policy-making; the crusade has been bureaucratized, and tamed in the process. Taking their cues from the President and from Congress, the federal enforcement agencies have largely abandoned the field to private litigants and the courts. The broad coalition of groups committed to achieving racial justice, which gave strong support to the early desegregation efforts, has been unable to sustain its force; those currently addressing the issue have many conflicting interests. All this reflects a broad change in the very meaning of the evil to be undone.

A decade ago, "segregation" implied deliberate efforts on the part of Southern school districts to keep blacks from attending school with whites. The names given to the practices—massive resistance, pupil-assignment laws, school closings—varied from state to state, but the intent was unambiguous. The perceived gulf between Prince Edward County, Virginia, where it took a Supreme Court order to reopen the public schools, or Little Rock, Arkansas, where even token desegregation could be accomplished only because of the presence of the National Guard, and the rest of the nation could not have been wider. Segregation was a blatant Southern phenomenon, towards which almost everyone else, including the federal government, felt deep outrage.

Events in San Francisco illustrate how dramatically that understanding has altered. In 1957, the superintendent of the San Francisco public schools called a press conference to deplore the lawlessness of Little Rock. Ten years later, he retired amid charges of "racism." Shortly thereafter, a federal trial court found that San Francisco had "deliberately" segregated black students and ordered the district to desegregate its public schools. San Francisco was the first large non-Southern city to feel the effects of the changed constitutional meaning of deliberate segregation, but otherwise its experience is not atypical. In the 1971 Charlotte case, the Supreme Court concluded that cities were not constitutionally different from rural communities; they were just bigger. Nor was the North so uniquely virtuous as had generally been supposed. By the late 1960's,

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Northern federal courts were beginning to construe school-board decisions concerning pupil and teacher assignment and school construction as acts of *de jure* segregation, the legal equivalent of the dual school laws struck down by *Brown;* this view was eventually affirmed by the Supreme Court in its 1973 Denver decision. The enemy, as Pogo would say, was "us." To its embarrassment, Congress found itself accepting the demands of Southern Congressmen that federal desegregation be undertaken on a nationwide, not just regional, basis. The administrative guidelines promulgated under Title VI of the 1964 Civil Rights Act would now "be applied uniformly in all regions of the United States." Almost simultaneously, the executive agencies began edging away from the fray, reflecting a shift in popular mood.

The closer to home the reality of court-ordered desegregation came, the less comfortable large segments of the North and West were with it. Not that support for the *idea* of desegregation had waned. Quite the contrary: When polled by the National Opinion Research Center in 1975, more than 90 per cent of white Americans said that they would willingly send their children to a school where at least some of the students were black; support for integration among blacks was even higher. Unadorned racism has become decidedly deviant in the years since *Brown,* and that new policy consensus is quite possibly the major consequence of the decision.

The reasons that courts invoked to justify compulsory desegregation and the obligations imposed in its name, however, led to difficulties. In the Denver decision, the Supreme Court adopted the legally commonplace standard that a school district, like an individual, may be presumed to have intended the foreseeable consequences of its actions. If, for example, a district built a new school serving an entirely black neighborhood, it would be presumed that the school was constructed in order to enforce a segregated regime. Like many other legal presumptions, this one can be rebutted. Demonstrating that a school district conscientiously maintains a neighborhood policy that does not take account of racial factors can suffice—and, in San Jose, California, for instance, did suffice—as an innocent explanation for this racial separation.

Similar presumptions are common among lawyers. But laymen, not lawyers, constitute the critical audience for major judicial decisions, and the Supreme Court did not explain its understanding of intentional segregation in language that the conscientious layman could reasonably be expected to understand. As a result, cries of arbitrariness—why us, but not them?—alternate with exclamations

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of incredulity, even on the part of experts. "I was appalled by the judge's sloppy reasoning," said one San Francisco school-board member, in the context of that city's desegregation case—and he was a lawyer.

From causes to cures

If the new definition of segregation provoked consternation, the "cure" for this constitutional sin has stirred outrage. During the early Johnson years, the remedy sought through both administrative pressure and judicial decision was a rule allowing students the opportunity to select which public school they would attend. "Freedom of choice," particularly when coupled with efforts to make the schools among which students could choose equal in other pertinent respects, seemed to undo the evil of discrimination. It was a color-blind remedy, one which might be said to purify the process of student assignment. Yet free-choice remedies turned out to have little effect on the pattern of student attendance. A handful of intrepid blacks were admitted to formerly all-white schools, but the old "colored" schools invariably remained all-black. That, the Supreme Court held in 1968, was the fatal defect of this approach. Only when the past effects of enforced segregation had been removed "root and branch," the Court stated, would a school system have satisfied its constitutional obligations; and that meant "a system without a 'white' school and a 'Negro' school, but just schools."

This vital shift in doctrine from process to outcome as the constitutional concern went little noticed at the time, because the defendant school district in the 1968 case was a rural county with a small student population.

Following legal logic, the Supreme Court applied the same standard in urban Charlotte-Mecklenberg, North Carolina, approving plans for transporting students as part of a complete desegregation remedy. Legal logic has little to do with popular perception. Never mind that "freedom of choice" placed a heavy burden on black students, or that school districts which had always maintained separate schools could easily discourage black students from deciding which school they really wanted to attend. Forget about the Court's expressed concern for the safety of children transported long distances to school, or the half-century history of such transportation. Ignore all of the Court's statements that a constitutionally permissible remedy could only cure past wrongs, not secure permanent racial balance. By the early 1970's, the watchword was "busing." The dread

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idea that school children would be transported from their neighborhoods in order to satisfy the dictates of a judge unified national white opinion; three quarters of Gallup Poll respondents in 1971, both North and South, opposed busing to achieve desegregation. (Black opinion was almost evenly divided.) Just as Little Rock and Orville Faubus had symbolized the early post-*Brown* years, the equally defiant figure of Louise Day Hicks and the conflagrations in Boston marked the 1970's. The valiant attempts of lower courts in Boston, and less visibly in Detroit and Denver, to link desegregation with sensible educational reform went unnoticed and unappreciated.

As desegregation, redefined by the courts, was imposed on an increasing number of school districts nationwide, its benefits appeared less self-evident. For one thing, the possibility of desegregating the country's urban areas grew more remote. Whites continued to move from city to suburb, as they had since the 1950's, leaving many city school systems largely black. Court decisions could not reverse this trend; indeed, there has been heated but inconclusive debate over whether busing orders exacerbated it. In the 1974 Detroit case, the Supreme Court undercut the prospects for metropolitan-wide relief by confining desegregation remedies within school-district boundaries. How could there be desegregation without a white community?

And what tangible good would it do them? Social scientists reported disappointing findings. Desegregation had, at best, modest positive effects on black achievement and attitudes toward schooling; it neither benefited nor harmed whites. Some black communities vociferously opted for different strategies, preferring instead to run their own schools. This reflected a more general reassessment of the value of assimilation to blacks, a process which helped to disassemble the civil-rights consensus of the mid-1960's. White liberals who had been part of this consensus, and who perceived themselves as involved in a heroic struggle for racial equality, became uneasy when accused of a new and demeaning paternalism. Minority demands for community-controlled schools came to little, and evaporated along with the rhetoric of the times. They have been replaced, in cities like Oakland and Washington, by a more pragmatic concern for competent school management involving blacks in significant roles, and for the provision of a decent education. Issues of race and schooling no longer seem quite so important to blacks, whether they involve community control or desegregation.

Meanwhile, new groups—women, other ethnic minorities, the

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handicapped—came forward to claim that they, too, were victims of discrimination. Their claims were scarcely baseless. Yet a cynic would say that the federal government responded with considerable dispatch to these new and diverse grievances as a means of defusing, if not confusing, the volatile issue of race and schooling.

The federal response: 1968-1976

By 1968, the executive branch was splendidly equipped to enforce then-existing law, and even to make new law. The Justice Department, authorized by the 1964 Civil Rights Act to bring suits against *de jure* segregated school districts, had combined an historic meticulousness in case preparation with an increasing willingness vigorously to exercise its authority. Arguing before the Supreme Court during the final days of the Johnson Administration, the Department contended that "effective desegregation is not accomplished so long as there remain all-Negro schools, attended by an overwhelming majority of the Negro children [in the school district.]" In so doing, the Department adopted an activist view of its statutory authority, aligning itself with those who viewed desegregation in terms of racial outcomes, not color-blind school admission policies. It pursued that declaration by filing three major Northern desegregation suits in the midst of the 1968 Presidential campaign.

HEW's Office of Civil Rights, charged with reviewing the desegregation efforts of all school districts, had made even more spectacular advances. In the minds of those who had drafted the Civil Rights Act, the courts were supposed to define discrimination, and HEW, with its substantially greater manpower, to enforce the judicial standards. In actuality, the process worked in almost precisely the reverse fashion. It was HEW's "guidelines," rules adopted under the aegis of Title VI (but without the Presidential approval contemplated by the act), that appellate courts embraced and enforced as minimal constitutional requirements. The bureaucrats, not the judges, were making law by introducing specific standards for racial balance.

Moreover, the several branches of government were apparently working as one: A broad mandate from Congress coupled with the enthusiastic commitment of the Executive and the strong support of the courts, made coherent policy possible during the Johnson years. Yet appearances were deceptive. Because this policy was refined by low-visibility executive agencies and the courts without formal Congressional or Presidential approval, and because it went beyond the delicate consensus that had produced the 1964 Civil

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Rights Act, it was vulnerable to subsequent political attack, from which only the courts could claim some immunity.

It is convenient, but not entirely correct, to mark the advent of the Nixon Administration as the point when the federal government began resisting new desegregation initiatives. Nixon had run an "anti" campaign, and "massive desegregation" was one Johnson-era legacy that aroused his public ire. Yet in 1968, government policy was at a crossroads. Dual school systems were almost a thing of the past in the rural South; a convulsive and by most accounts successful revolution had been achieved in only four years.[1] There existed, however, no clear policy concerning Southern cities—Raleigh, North Carolina, and Columbia, South Carolina, were in the midst of negotiations with HEW—and no policy at all with respect to the North. Given the changing character of the desegregation issue, would—could—a Democrat in the White House have proceeded vigorously to apply federal law in the cities and in the North? Or is the question itself perversely put: Does the nature of Presidential leadership, regardless of party, profoundly influence the national temper concerning desegregation?

Richard Nixon had little interest in education. During his only interview with Education Commissioner James Allen, the President posed just one question—"Can't you do something about the discipline problem?"—which seemed to mistake the country's top school official for an urban principal. About desegregation, however, Nixon did have views: The adventurism and inflexibility of the past should cease, and the Administration should pay more attention to the legitimate grievances of Southern school officials. In order to accomplish that end, Nixon first had to bring his unruly bureaucracy into line.

Presidents, unlike monarchs, cannot change policy by simple directive. The policies being pursued by the Justice Department and HEW were not primarily attributable to the goading of the White House or civil-rights groups. In the view of the enforcers, the policies represented what was good and necessary. Conciliatory efforts had been perceived by school districts as a sign of weakness, not sensibility. Desegregation in the South—its "second reconstruction," as political scientist Gary Orfield aptly called it—could come only from the determined imposition of federal will, epitomized by the

[1] When appealing to his liberal constituency, Nixon observed that during his first year in office he had achieved more desegregation than his predecessor ever had; the statement was true but misleading, since the orders which produced that result had largely been issued in the last days of the Johnson Administration.

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cutting off of federal funds. The notion that school districts could not be treated uniformly for desegregation purposes, but required idiosyncratic attention, was similarly unpersuasive. Government just could not function without guidelines, yardsticks against which to measure success. All school officials think that they have unique problems, it was said, particularly when they need to find reasons for procrastination. Educational dilemmas? Those would be resolved, if at all, after desegregation had occurred, with the aid of federal "technical assistance" grants. By the late 1960's, the aim of both the Justice Department and the Office of Civil Rights was straightforward: complete the desegregation of rural Southern school systems and then move on to the harder problems represented by the cities and the North.

The executive-branch agencies had been relatively insulated from Congressional and Presidential pressure before 1969. No longer; as Leon Panetta, fired by Nixon as head of HEW's Office of Civil Rights, recalls:

> Ideally, most of my time would be spent looking inward at my 278-man unit, making it function smoothly, making sure that it did the job well, enforced the law firmly, but behaved fairly and in such a way that it might even be said that OCR under the Republicans earned respect from those they had to bring into compliance. This was the ideal. In fact, from the outset, the vast majority of my time was spent fighting off political and legislative attacks on the program, anxiously searching for reinforcements and hoping allies would ride to the rescue.

Panetta's ideal was naive; racial issues are necessarily and properly political as well as judicial. They *had* been political during the turbulent days when the Civil Rights Act was debated. That the act did pass signaled not the end of political opposition, but that on that day, in the shadow of the memory of a recently assassinated President, the opponents lacked the votes. As the nature of the desegregation issue changed profoundly between 1964 and 1969, so too did the character of the political opposition. And that, in the mind of the Administration, implied a substantial redirection of Administration—particularly OCR—efforts.

The actions of the agencies

The Office of Civil Rights did not surrender without struggle. After all, its leadership argued, neither the statute nor the guidelines had been altered; why should its mission change? White House staff members pressured HEW Secretary Robert Finch to behave

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charitably toward the South, and Finch vacillated. Fund cutoffs in five districts, scheduled for school opening in 1969, were rescinded that summer—but three were later restored. Panetta and Harry Dent, the Dixie presence in the White House, battled over the language of Finch's public statements. Contradictory statements concerning the deadline for rural Southern district desegregation poured out of HEW and confused everyone. An HEW-drafted plan ordering desegregation in Mississippi was attacked by Secretary Finch himself, who during the summer of 1969 wrote to the Chief Judge of the Fifth Circuit Court of Appeals that the plan would create "chaos, confusion, and a catastrophic educational setback." Other federal officials who knew anything about the plan refused to endorse Finch's position, which the Supreme Court unanimously repudiated. The time for "all deliberate speed," the Court declared, was over; desegregation must occur "at once."

By 1970, the Administration had finally succeeded in restricting OCR's enforcement authority. Segregation in Southern cities and the North would not be seriously addressed. Panetta, the last of the agency's true believers, was gone. And so too, for all practical purposes, was the Office of Civil Rights. The agency continued to review Northern school-district compliance with Title VI and 1968 administrative guidelines, which required assurances that student-assignment and school-construction practices were not exacerbating segregation. But despite widespread findings of behavior inconsistent with the guidelines, school officials were called upon to take corrective measures in only a handful of instances. When in 1973 the Center for National Policy Review went to court to obtain access to HEW records, it found that "while a few staff investigations have been shaky, HEW's files literally bulge with the documented evidence of violation of laws." By that time, however, no one except civil-rights-minded outsiders was reading, much less acting on this evidence. The President had concluded that HEW's sole sanction—cutoffs of federal funds because of noncompliance—represented an inappropriate way to enforce the law, and so would not be exercised. The Justice Department would be the only executive agency with authority over desegregation policy.

Civil-rights groups have tried to reverse this. In 1973, they went to court seeking an order compelling OCR to enforce the 1964 Civil Rights Act. The District of Columbia Court of Appeals, sitting *en banc*, unanimously ordered the agency to begin fund cutoff proceedings against 74 rural Southern districts that had reneged on previously approved desegregation plans and 42 additional Southern

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districts that HEW had deemed to be in violation of the standards laid down by the Supreme Court in the Charlotte case. HEW was ordered to demand an explanation from another 85 Southern districts for the persistence of one-race schools. This judicial effort to question the exercise of administrative discretion was almost without precedent. Its message was clear—HEW itself had violated the law: "HEW is actively supplying segregated institutions with federal funds, contrary to the expressed purpose of Congress . . . Congress' clear statement of an affirmative enforcement duty [in Title VI] should not be discounted."

Yet courts cannot manage administrative agencies, no matter how tempted some may be to try. HEW had been told to review several hundred cases, and it did, with rare dispatch. But the review produced little actual desegregation. The court did not, and perhaps could not, state with precision just what standard HEW should apply in assessing each case, and OCR insisted upon the merest show of cooperation. A supplemental 1975 district-court order has had a similarly modest impact, and the civil-rights groups are back in court yet again.

The Office of Civil Rights has found new missions to pursue in the 1970's. It is busily enforcing requirements for bilingual education in school districts with substantial numbers of non-English-speaking students. For a time, the agency insisted that districts provide bilingual-bicultural instruction, a demand that went far beyond what the Supreme Court had said the Civil Rights Act called for. The agency has also taken a belated interest in sex-based discrimination, the subject of 1972 Congressional action. Its heavy-handedness in dealing with university "affirmative action," including threats to cut off federal funding even without showing discrimination, prompted Harvard President Derek Bok to conclude: "The critical issue for the next generation is [higher education's] independence and freedom from government constraint . . . [including] stifling bureaucratic requirements." The agency is also worried about the plight of non-white children labeled by schools as retarded or educationally handicapped. None of the issues is trivial, even if some of their manifestations—such as the squabble over the legality of father/son or mother/daughter school nights, or all-boys' choirs—are plain silly. And who would be able on political (or moral) grounds to choose among the claims of blacks, the non-English speaking, women, and the handicapped?

These claims might compete for attention, but the Office of Civil Rights has not let that happen. Having relegated racial questions to

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the back burner, the agency now insists only that the facilities provided to children in predominantly black schools be roughly equivalent to those offered to children in predominantly white schools. Such serious attention as is now paid to the desegregation question occurs in the Justice Department and, more importantly, the Congress.

The burden of litigation

If one conceives of desegregation as essentially a legal problem, it makes sense to invest the Department of Justice, in effect the legal counsel for the nation, with primary responsibility for enforcing the 1964 Civil Rights Act. The act itself authorizes the attorney general to bring suit in order "materially [to] further the orderly achievement of desegregation in public education." Unlike HEW, which has been accused—not always unreasonably—of slipshod research and singlemindedness, the Justice Department has a reputation for painstaking case preparation and for prudence and even-handedness. That is precisely what the White House asserted in transferring desegregation enforcement to the Department's Civil Rights Division.

The Justice Department responded with alacrity to its new assignment, identifying eight possible suits, including one in Chicago, within a week of the White House decision. Statewide actions, long urged but never previously undertaken, were proposed. Yet the efforts died almost as soon as they began, because of the contretemps over HEW's proposed delay in implementing the Mississippi desegregation plans. Resignations and protests by lawyers not normally given to such activity became the order of the day. "[T]here is no leadership in civil-rights enforcement," one of the more temperate resignation statements declared.

The Justice Department was eventually authorized to complete the desegregation of the rural South—an enterprise requiring little, if any, new busing. But beyond this, the Department was essentially unable to seek further desegregation. It argued against an extensive busing remedy in the Charlotte case, only to lose in the Supreme Court. That decision simply hardened the Nixon Administration's opposition to busing. Any government official insisting upon a remedy requiring pupil transportation should look for other employment, the White House declared. Within months of the Charlotte decision, Justice Department attorneys found themselves disavowing in court a desegregation plan prepared by HEW for Austin,

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Texas. In other cases, the Department's sole interest was to minimize the amount of court-ordered busing.

During the past several years, the Justice Department has participated in a modest way in desegregation litigation. When it attacks school-district discrimination, as in Indianapolis and Omaha, the quality of its effort is unmistakable. This renascence, if it can be so described, may have been attributable to the more moderate views of President Ford and to the undoubted ability and integrity of Attorney General Edward Levi. Yet because of the Department's exacting standards for case preparation and the small size of its staff, the Civil Rights Division has not been able to undertake more than three or four suits at a time. For that reason, private organizations—not the Justice Department—have borne the primary burden of litigation.

The redefinition of *de jure* segregation and the emergence of the new, non-racial minorities have created dilemmas for the Justice Department. Attorney General Levi has described the situation:

> Today the Civil Rights Division's effort against race discrimination is a more subtle one. Often it is difficult now to show a history of *de jure* segregation, and more importantly, as the quest for equal opportunity becomes more successful, some of the demands of minority groups might, if met, involve unfair deprivations of others. A difficult balance is required.

But the Justice Department has responded to such complexity by vacillating. Its representatives speak out strongly at times for desegregation—even for busing—only to qualify subsequently their statements. The Department drafted legislation to curb the role of the federal judiciary in framing remedies and almost simultaneously the Solicitor General appeared before the Supreme Court in the 1976 Pasadena case to argue that trial-court flexibility should be preserved. Viewed as a whole, its actions embody neither apparent purpose nor principle.

Limiting the authority of HEW

In the 1964 Civil Rights Act, Congress coupled its general proscription of discrimination with a specific definition of school desegregation. The Act codified the prevailing constitutional distinction between deliberate or *de jure* segregation, which was prohibited, and adventitious or *de facto* segregation, which was invulnerable to legal attack. All that HEW could insist upon was school-district adherence to the color-blind treatment of students; it could not re-

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quire "racial balance." A genuine neighborhood-based system which did not take race into account in assigning students was presumably permissible under the statute, as was a plan giving students the unconstrained option to choose among public schools.

The Civil Rights Act was subject to HEW interpretation, and in the view of some Congressmen, the guidelines promulgated by HEW exceeded the statute's scope. For one thing, beginning in 1966 Southern school districts which adopted free-choice assignment schemes were expected to show that substantial desegregation, measured by the numbers of blacks attending schools with whites, actually occurred. The Office of Civil Rights contended that such color-consciousness was needed to remedy past discrimination, and hence did not violate the legislation. The judiciary concurred, and embraced the HEW guidelines as the prevailing legal standard. Southern Congressmen, however, were unconvinced. Moreover, HEW began contemplating action against Northern school districts, ostensibly not to secure "racial balance"—something the Department legally could not do—but to undo *de jure* segregation in a region of the country previously thought to be untainted. The distress aroused by that prospect was more widely shared.

Beginning just two years after the passage of the Civil Rights Act, the House of Representatives annually sought to limit HEW's authority, only to be rebuffed by the more liberal Senate. By 1970, however, the attitude of Congress had changed. The first indication of this was the legislation, authored by Mississippi Senator John Stennis, requiring HEW to enforce its guidelines in the North and West as well as in the South; the South, said its spokesmen, was no longer under a Congressional bill of attainder. It was the magic word, "busing," that pushed Congress from equivocation to naysaying, and in this respect its behavior has been consistent with that of the Administration.[2] If national urban school-district desegregation involving substantial busing were to occur, Congress wanted little part of it. What it lacked was any alternative vision of its own.

Dissembling was characteristic of Congress' performance during the late 1960's. Mississippi Congressman Jamie Whitten would regularly attempt to attach an amendment to the HEW appropriations bill whose intended effect was to prevent HEW from using threatened fund cutoffs to coerce student reassignment in segregated districts. Michigan Democrat James O'Hara responded with a require-

[2] Senator Walter Mondale's Select Committee on Equal Educational Opportunity did attempt to defend the courts against their most irresponsible critics and to puzzle out a sensible desegregation policy, but its effort was largely ignored.

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ment that HEW could not insist upon reassignment to achieve "racial balance." Because the O'Hara amendment merely reaffirmed the language of the Civil Rights Act and hence imposed no real restraints on HEW, it had no practical effect. Its political assets, however, were considerable. Voting for the O'Hara amendment, as Congress did, permitted legislators to tell liberals that they supported desegregation, conservatives that they opposed it.

As unhappiness with desegregation grew, Congress sought to foreclose the possibility that the Office of Civil Rights might be sufficiently revived to address urban segregation. "No . . . department or agency of the United States," the Equal Educational Opportunity Act of 1974 stated, "shall . . . order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence. . . ." What the Nixon Administration had already accomplished in fact was now presumably true in legal form as well. HEW was out of the busing business—or was it? The 1964 Civil Rights Act did not give it the authority to "order the implementation" of anything. It could insist that a school district produce an acceptable desegregation plan as a condition of receiving federal funds, but it was not that authority to which the 1974 statute spoke—or so a careful legal exegesis might conclude. No matter: Two days after it was signed into law, the Director of the Office of Civil Rights announced that the agency would be bound by the layman's reading of the bill.

The 1974 legislation also purported to limit the courts' role, insisting that courts confine busing orders to the "next nearest" school. Unlike HEW, courts *do* order the implementation of remedies; had that proscriptive language stood alone, a constitutional confrontation between the authority of the courts under the 14th Amendment and Congress' power to check that authority would have been in the offing. Again, however, Congress' seemingly forthright action was so much fluff. Other sections of the statute "permitted" courts to order "the transportation of students for the purpose of remedying a denial of the equal protection of the laws . . ." where "all alternative remedies are inadequate." These provisions could only be read as allowing courts to proceed as they saw fit, thus imposing no restriction on judicial action.

There has been more, but for the most part not very constructive federal legislation. Although the Emergency School Assistance Act has made limited funds available for desegregation, Congress has fixated on busing; the HEW appropriations legislation is now the annual occasion for restricting further the authority of that toothless

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tiger, the Office of Civil Rights. In 1975, Senator Hugh Scott proposed an amendment requiring that HEW's funds not "be used in a manner inconsistent with the enforcement of the Fifth and 14th Amendments to the Constitution of the United States and Title VI of the Civil Rights Act of 1964," which would have enabled HEW to implement the statutory and constitutional law. Congress substituted a clause that strengthened the 1974 restrictions on busing, thereby limiting HEW's authority to enforce the general "nondiscrimination" provision of the 1964 Civil Rights Act: HEW could not try to remedy even admittedly *de jure* segregation by modifying neighborhood school-assignment practices. Not that this made any difference: HEW had long before been denied a role in such matters. Never has a coffin had so many superfluous nails hammered into it.

Gary Orfield, a long-time student of the federal role, aptly summarized the policy consequences of these Executive and Congressional actions: "When one asked, in the mid-1970's, which federal agency was responsible for making the constitutional right [to nonsegregated education] a reality in school systems across the country . . . the answer was none."

The rules of the game

To imagine that the federal role in desegregation can only be understood in terms of either enforcement or abdication betrays a dearth of imagination; yet such are the exclusive choices that are too often offered by partisans on either side of the question. To equate integration with busing trivializes a great concern, but that has been done, and the legislative and executive branches have consequently been paralyzed. Is there a way out of this policy *cul de sac*?

The most obvious way to think about desegregation policy is in terms of rules, legal do's and don't's. We have grown accustomed to this approach during the past 20 years. It took an authoritative determination of constitutional obligation, amplified and enforced by Congressional and Executive action, to make desegregation a national fact of life. According to the legalistic view, school districts which obey the law by not "discriminating" against black students are impervious to legal or administrative challenge. Conversely, those who break the rules suffer reprimand, by either an administrative agency or a court, and are ordered to behave differently; defiance brings judicial contempt citations, more precise orders, or

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loss of federal funds. In such instances, the imposed remedy serves both to secure the legal rights of blacks and to punish official wrongdoing.

Because the determination of wrongdoing and the consequent propriety of a solution depend entirely on the constitutional or statutory understanding, legalism commends itself to both those who would expand upon and those who would further contract the federal role in desegregation. Those wanting more desegregation rue Congressional repeal of many of the statutory "don't's"; they favor judicial adoption of a constitutional standard mandating racial balance in the cities (and perhaps in metropolitan areas) regardless of what factors caused the existing racial separation.

What has been done by legal rule can similarly be undone—or so those who see the prevailing rules as disastrous believe. In 1975, some 25 bills and 29 constitutional amendments were introduced in Congress, each with the single purpose of restricting the courts' authority to order busing. On April Fool's Day of 1976, the Senate debated an amendment to a pending appropriations bill which would have denied lower federal courts jurisdiction over any public-school-related case; had that amendment passed (29 senators voted against tabling it), the presumably more conservative state courts would have become the primary rule-makers and enforcers. The most serious of these legislative proposals, drafted by Ford's Justice Department and introduced by Senator Roman Hruska, conceives of desegregation almost entirely as a legal question. Its key provisions would allow courts to undo only that quantum of segregation that can reasonably be attributed to unlawful discrimination by a school district; even in those cases, a busing remedy could be imposed for no more than three to five years.

On their merits, the partisans' arguments fail to satisfy. Why must racial justice be identified with racial balance, as those who want more busing urge? On the other hand, can a court realistically be asked to do the job Senator Hruska's bill contemplates, namely, to discern and remedy the segregation due to discrimination by school officials while ignoring that caused by housing discrimination or fortuitous demographic shifts? Even if this feat could be accomplished, one would still wonder why it had been thought appropriate in the first place. The idea of limiting the duration of busing remedies has considerable appeal; but why would one conceivably want to disrupt a school district's neighborhood assignment pattern, only to revert to that pattern a few years later? In constitutional terms, the reversion itself might well embody a new act of unlawful dis-

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crimination.[3] Its effect on the educational system—and, most vitally, on schoolchildren—would necessarily be unfortunate.

To make desegregation a matter of obeying rules, as both sides do, reflects at best only a partial understanding of the dilemma; at worst, it can work much mischief. Justice Byron White's observation concerning the role of courts suggests a broader function of law in this domain: "the [district court's] task is not to devise a system of pains and penalties to punish constitutional violations brought to light. Rather, it is to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools."

Rule-mindedness and attempts at uniformity through administrative guidelines characterized federal desegregation efforts during the 1960's. Perhaps this course of action can now best be appreciated as a response to necessity. It is difficult to imagine how the blatantly racist subterfuges of that era might have been undone differently. But necessity will no longer suffice as a justification.

Consider the demographics of segregation. Although almost half of the Southern black students presently attend majority-white schools, far fewer Northern black students—28.3 per cent in 1972—were enrolled in such schools. Concealed by those gross statistics are cities like Chicago, Detroit, Washington, and Philadelphia, where blacks constitute substantial majorities of the student population. Whether the enforcement of uniform rules requires the purchasing of a fleet of school-district helicopters or the abandonment of these cities to their "natural" fate, the price seems excessive.

Moreover, uniform rules presuppose that "integration" has a common meaning from place to place. That assumption confuses desegregation, the mere bringing together of blacks and whites, with the vastly more complicated enterprise of integration, the linking of race and basic educational purposes. If efforts to teach whites and blacks together aim to do more than arouse the prejudices of both races, integration must become significantly fused with the educational mission of the schools. Questions of race touch upon almost all other issues of educational policy: They affect the allocation of district funds, the nature of school governance, the instructional program that is offered, and—most importantly—the sensitivity of the institution to radically altered circumstances. It is foolish to imagine that black and white students, whose life experiences and

[3] In both Detroit and Denver, the school boards' recisions of proposed desegregation plans were held to be acts of *de jure* segregation; the same constitutional conclusion seems appropriate when what is rescinded is not a promise to desegregate but desegregation itself.

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educational expectations were previously so different, can accommodate themselves without fuss and strain to each other and to the system, or that the system itself can persist unchanged. In such a situation, success or failure is not essentially a matter of numbers. Whether racial balance (or some other formula) is achieved matters far less than the subtler and more far-reaching changes in the very nature of the education that the society makes available to its children and the civic order that makes possible this education.

Integration has not been much tried. Desegregation has occurred instead, with decidedly mixed results. White and middle-class parents are not merely demonstrating racism in expressing concern for the quality of their children's education in a desegregated system. Nor are poor and minority parents misguided in the frequently expressed belief that their children need rigorous instruction in basic verbal and arithmetic skills more than the presence of white students. Phrases such as "quality education" got bad press when used to signal a retreat from desegregation. They retain meaning for an educational system whose primary task has, after all, to do with teaching something to students. The trick is to relate integration to these concerns, not to dismiss or apotheosize them.

For these reasons, uniform rules have only a marginal place. There is just no way for the federal government to bring about by any single dictate what the Civil Rights Commission, in its cumbersome prose, calls "a quality of educational and interpersonal interaction based on the positive acceptance of individual and group differences as well as similarities." There exists no single formula, legal or otherwise, for successfully linking integration to the overall educational enterprise. If integration is to be something other than Justice White's "system of pains and penalties," it will necessarily depend upon the educational dynamics of the particular community, not just upon rules.

The role of the courts

The matter is yet more complex. As the courts have reminded us, there must be *some* rules, for without rules there is only power, not law. Hence, the critical policy question: *Can a legislature, consistent with the 14th Amendment, devise rules that serve as badly needed symbols of fairness, and simultaneously recognize the equally vital need for diversity that we have come to appreciate?*

The judiciary has become acutely aware of this dilemma, particularly as it affects the shaping of a remedy for *de jure* segregation.

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The Supreme Court has repeatedly ceded much discretion to lower courts, thus encouraging variation. It drew the line only in the 1976 Pasadena case, in which the trial court had insisted on perpetual changes in school-attendance zones to assure continuing racial balance.[4] District court judges have relied upon educational experts, biracial task forces, and most of all on school boards themselves in drafting remedies that made constitutional and pedagogical sense. The recent efforts of judges in Boston, Detroit, and Denver to couple student reassignment with a host of other policy changes—new student-discipline codes, magnet schools whose curriculum is supposed to lure students irrespective of residence, teacher retraining, and bilingual instruction—epitomize the quest for a remedy consistent with "the central educational function of the schools."

These courts have been roundly criticized for deciding questions that far exceed either their competence or their jurisdiction. This charge contains an important element of truth. No matter how "representative" the advice a judge may receive, no court can substitute itself for the political process. With respect to matters educational, courts may not be notably worse informed than school boards, but at least in legal theory the courts are not supposed to assume the functions traditionally reserved for school officials. Yet judges generally find themselves taking "non-judicial" action—changing school principals, for instance, as occurred in Boston—only because the political authorities themselves have defaulted, refusing to respond to even the broadest of judicial mandates.

The extraordinary difficulties which currently confront the judiciary are exemplified in the most recent round of the desegregation litigation in Detroit. After the Supreme Court overturned a remedy encompassing the larger metropolitan area, the trial court adopted a plan limited to the city—no simple task in a school district more than three-quarters black. The judge succeeded in substantially reducing the number of predominantly white and black schools; but because under his plan half of the district's schools remained more than 90 per cent black, the NAACP appealed, calling the remedy "bizarre." The plaintiffs had a strong legal point. It is nearly impossible, under the rule laid down by the Supreme Court in the Charlotte case, for a city such as Detroit, which had been found deliberately to have segregated students in the past, to explain satisfactorily the persistence of one-race schools. But the trial judge undeniably had practical wisdom on his side. Making all schools three-

[4] Earlier, in the Detroit case, the Supreme Court circumscribed the power of district courts to order inter-district remedies.

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quarters black and one-quarter white in the name of undoing discrimination would have been a futile gesture, one guaranteed to hasten the transformation of Detroit into an all-black school system. In a remarkable opinion, the appellate court recognized the validity of *both* viewpoints. It accepted the proposition that no further desegregation could be accomplished, but nonetheless ordered the trial court once again to attempt the impossible and reassess the claims of those blacks excluded from the desegregation plan: "This court finds itself unable to give any direction to the district court which would accomplish the desegregation of the Detroit school system in light of the realities of the present racial composition of Detroit." Despite their order, what the appellate judges were really saying was that a court can do no more in such a situation; only a politically generated solution, in which the suburbs are induced to share Detroit's predicament, would have any prospect of success.

The courts would like nothing better than an intelligent, politically and educationally conceived approach to the question of race and schooling. The California Supreme Court's unanimous opinion in the Los Angeles desegregation case, a decision whose influence should be felt beyond the borders of the state, says it most clearly:

> [A] school board fulfills its constitutional obligations . . . so long as it undertakes reasonably feasible steps to alleviate segregation and its accompanying harm. . . . Experience has taught that the task of integration is an extremely complex one which entails much more than the assignment of specified percentages of pupils of different races or ethnic groups to the same school. . . .
>
> In light of the realities of the remedial problem, we believe that once a court finds that a school board has implemented a program which promises to achieve meaningful progress toward eliminating the segregation in the district, the court should . . . stay its hand even if it believes that alternative techniques might lead to more rapid desegregation of the schools. . . . *In the absence of an easy, uniform solution to the desegregation problem, plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope for the attainment of integrated public schools.* . . .

Only when "school authorities default in their constitutional obligation to minority children," the opinion asserts, should the judiciary become involved.

That role, as the California Supreme Court recognizes, is "an exceedingly difficult, sensitive and taxing one, requiring the balancing of many competing values." It is also one better performed by the legislative and executive branches of government. They possess what

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the courts lack, namely, money and the capacity to summon political support for its intelligent expenditure; the political branches are also capable of significant symbolic statement. Although the courts will continue to decide cases of racial discrimination, at least until a less tolerant America repeals the 14th Amendment, they neither want nor warrant the authority they have assumed in the wake of ethical uncertainty and political default. The federal government can only help states and communities achieve desegregation within the kind of educational system that they want. That prospect, not a fixation on legalisms, is the core of sensible policy.

The limits of legalism

When the present disappoints, the past looks better by comparison. In the realm of desegregation, however, the mid-1960's must for the most part remain nostalgia, appreciated precisely because we can remember but not restore that era. At few other points in our history has a moral vision been so tightly fused with a sweeping sense of the politically possible. This quite special circumstance enabled the federal government to ignore the competing claims of federalism and localism, and impose desegregation as an act of national will. Today, the issues are no longer clear-cut, and politicians are concerned, not committed. A vision more complicated and more circumspect is called for.

Not that the past is irrelevant. It teaches us, if we had not already learned from the decade between the *Brown* decision and the passage of the Civil Rights Act, that questions of race and schooling can only be confronted with some hope of ultimate success if the will to do so is shared by the several branches of government and not confined to the courts. It was the combined efforts of Congress, the Executive, and the judiciary that made possible the dramatic desegregation of Southern schools during the Johnson Presidency. The parties who have to share political responsibility are different today—can anyone seriously imagine that even a unified federal government would have the last say in such matters without the cooperation of state and local governments?—but the necessity for collaboration remains a vital element of responsible policy-thinking.

We have learned a great deal about school desegregation, about the relevance of race in this society, and about the capacity of government to shape social behavior, during the past eight years. That knowledge sobers: It is discomfiting to realize that the American

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dilemma does not vanish in the face of visions of progress, and that social problems apparently become more elusive even as they seem finally amenable to solution. The Supreme Court's declaration in the second *Brown* decision, that desegregation had to occur with "all deliberate speed" rather than at once, may have been as misguided as is now generally supposed. But in reaching their decision the Justices recognized what has subsequently been ignored: Desegregation in schools constitutes a basic reworking of the practices, if not the principles, of this republic. For that reason, desegregation cannot be brought about instantly or painlessly (as those who thought that the geography of Boston was especially well-suited to efficient transportation have discovered to their sorrow). Nor can desegregation, even if fused with educational purpose, achieve miracles. Despite the lingering popular faith in the curative powers of education, schooling cannot overcome all of the divisions between blacks and whites, or the effects of those divisions on children. This realization counsels restraint. It does not justify policy abdication.

A uniformly applied remedy was the aspiration of the 1960's. First "freedom of choice," then free-choice schemes coupled with an insistence on a certain amount of racial mixing, finally desegregation measured almost wholly in terms of racial balance—each was in turn the standard fixed for the South. Uniformity was consistent with the legalistic abhorrence of apparent arbitrariness. It also, and importantly, represented a kind of fairness; one community could not complain that it was being treated more harshly than another. Yet, when courts came to examine Northern school-board practices, the constitutional standard that they adopted preserved the legalism, in the search for intent, without at the same time guaranteeing uniformity among Northern districts. The complaints about present-day judicial arbitrariness are not without foundation.

After the Denver decision, many Northern courts began to infer an intent to segregate from the mere existence of racial separation. Under such a constitutional interpretation, almost any district can be shown to have sinned. The exercise of hindsight can readily transform a decision to build schools that serve black (or white) neighborhoods into a finding that the schools were constructed in order to segregate blacks from whites—even where, as in San Francisco, the school sites were selected at the insistence of the NAACP. Within the past year, the Supreme Court has reaffirmed the distinction between discriminatory intent, a constitutional sin, and discriminatory effect, which does not violate the equal-protection clause. The Indianapolis and Austin desegregation cases have recently been

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remanded for a specific determination concerning whether extant racial separation was deliberately caused.

These decisions will, at the least, make it hard to prove *de jure* segregation. But the application of a newly strengthened intent standard makes little sense in this context. While the "intent" requirement is a defensible reading of the 14th Amendment, it remains susceptible to diverse interpretations in a setting where uniform minimum standards are needed. It ignores the obvious fact that segregation *always* results from official action, the assignment of students to particular schools. Most importantly, it is not a basis for judicial intervention that can readily be understood; its obscurity undercuts the possibility of popular acceptance.

A preferable constitutional approach, well within the Supreme Court's discretion in interpreting the equal-protection clause, would recognize the irrelevance of fault-finding with respect to school desegregation. Justice Powell's opinion in the Denver case takes this tack in proposing a "right, derived from the equal-protection clause, to expect that once the state has assumed responsibility for education, local school boards will operate *integrated school systems*":

> A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curricular opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind.

These standards make desegregation *every* district's responsibility, thus undercutting claims of arbitrariness. They also limit the scope of that responsibility, eliminating the largely unsatisfactory busing requirement that districts found to have practiced segregation now routinely encounter. Under Powell's formulation, only of its own volition would a district bus its schoolchildren to reduce racial isolation.

The Justices will have another opportunity to appraise the wisdom of Powell's standard. A more intriguing possibility is that Congress may incorporate similarly universal requirements and similar limitations on mandatory busing into federal law, thereby addressing the issue in political terms. One bill containing such features, the National Educational Opportunities Act, has been introduced by Congressman Richardson Preyer. If positive desegregation legislation of this sort is enacted, the Supreme Court would still have to decide whether it is consistent with the equal-protection clause, particularly insofar as the statute limits the use of busing to remedy

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past segregation. Whether the judiciary *must* defer to Congress in these matters is constitutionally unclear; a judiciary looking for an alternative to busing would find in such a law the vehicle with which to make a limited and graceful retreat.

By themselves, uniform minimum rules—such as those set forth in Justice Powell's Denver opinion and in the proposed National Educational Opportunities Act—do not represent a complete "solution" to the problems of desegregation; nor are they meant to. To a large degree, desegregation policy has to take into account differences among school districts. What elaborate formula could be applied at once to San Francisco, where blacks and whites together will shortly constitute a minority of the school population; Washington, D.C., whose students are more than 95-per-cent black; and Hartford, where community interest and logistical feasibility have made possible modest metropolitan school desegregation? In certain places, busing may indeed work well—especially where, as in Berkeley, it is voluntarily adopted by the community. Elsewhere, as in Richmond, California, a majority-to-minority transfer plan in existence for seven years has been utilized by an impressive one third of the district's black students; more interestingly, the plan has permitted some of the district's public schools to follow distinctive educational paths. Magnet schools, whose special curriculums draw students from an entire school district, have afforded a more exciting education to students, while simultaneously reducing racial isolation, in Dayton, Boston, and Houston. Cooperative arrangements between cities and suburbs, as in the Hartford area, or between public and private schools, make possible integration in a way that satisfies the wishes of all parties concerned. Other promising ideas have been too little tried. For instance, in cities with residentially integrated neighborhoods, school and community boundaries should deliberately coincide; to insist upon city-wide uniformity would jeopardize a community arrangement that has developed as a result of individual choices. It is also worth finding out whether an educational voucher system that secures substantial and individually chosen integration could be implemented; data from modest experiments in Milwaukee and Alum Rock, California, suggest that such a result may be attainable.

Measuring success

No one of these approaches would work as a uniform national formula. Whatever success any of them have will largely depend on

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the enthusiasm with which a given community embraces a specific reform. For that reason, they are best urged in the name of pragmatism, not required by the stern command of law. Such ventures can be part of a process thoughtfully designed to address racial questions neither quite so intractable as the Cassandras would have it nor so susceptible to formula as those trapped in the time machine of the 1960's believe.

The key word here is "process." Because integration touches upon almost every aspect of schooling in ways that cannot always be foreseen, embedded in the notion of "making desegregation work" is the expectation that the public schools have the will and the wit to learn from their mistakes. On some matters—what constitutes useful or spurious teacher training, for instance—a historical record has been accumulated; the district does not have to start from scratch. There is even a cookbook, *Achieving Effective Desegregation* (by Al Smith, Anthony Downs, and M. Leanne Lachman, Lexington, D. C. Heath, 1973), with extensive and detailed recommendations; like all cookbooks, this one contains some recipes that are well worth trying. But there are particular, local circumstances that may require tailored, ad hoc efforts.

Many of these vital matters cannot be resolved in Washington, whether by Congress or by the Supreme Court. Indeed, it is important to understand what the federal government *cannot* do well. There does remain a significant federal role, if the Executive and legislature choose to assert it. Uniform minimum standards can only be set by the national government, and they are best fixed, within the permissible bounds of the equal-protection clause, by its political branches. The federal government can also raise and redistribute substantial sums of money to encourage local experimentation with a diversity of approaches to integration. The Emergency School Aid Act, the one modest source of funds to aid school districts in the throes of desegregation, has been at least a minor success in this regard. Some 600 districts have spent their ESAA allotments on badly needed improvements in the school curriculum and earnest efforts to resolve racial tensions. The thoughtfulness of many district efforts, documented in several evaluations, suggests again that local units of government probably do best if left free from detailed federal requirements.

Distribute money and establish minimum standards—that much might conceivably be done at the national level. One can detect in the opinion-poll findings widespread support—perhaps even consensus—for this approach. Beyond that, Washington can only en-

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courage state and local educators, working within their own political frameworks, to identify the best way of resolving questions of race and schooling, selecting among the numerous options already described or adopting a course more precisely tailored to local needs. These alternatives are sufficiently different to warrant leaving the specific choices in the hands of state and local institutions, whose grasp of nuance is necessarily better than Washington's. Civil-rights groups, which during the 1960's viewed Washington as uniquely capable of protecting their interests in the face of state and local antagonisms, may well reject this assessment, but it is nonetheless reflective of recent history. The legislative and executive branches of the federal government cannot do more—at least, they will not do more very well.

Two bills considered by Congress in 1976 begin to address these issues. Senator John Glenn's recently passed School Integration Innovation Act will more handsomely fund the Emergency School Aid Act and expand the uses for such aid; expenditures for magnet schools, educational parks, and the construction of new schools between black and white neighborhoods are now eligible for federal subsidy. Both the new money and the new freedom for districts to use it as they see fit are welcome bits of legislative tinkering. Representative Preyer's ambitious National Educational Opportunities Act more boldly seizes the policy initiative. It sets forth federally set minimum legal rules (based unfortunately, if understandably, on the prevailing "intent" standard), establishes a universal legal right of students to transfer from schools where they are part of a racial majority to schools where they are part of a racial minority, and offers substantial financial aid to underwrite locally and regionally developed integration efforts. The particulars of federal policy will doubtless alter if the new Administration decides to take the initiative. But the passage of the Glenn bill, coupled with the impressively broad ideological support for Preyer's legislation, offers the hope that Congress is at last willing to reassert the authority of the political branch of government, to make its presence usefully felt.

Policy analyses press for solutions, where in fact there are often just more questions. The urgings here seem modest enough. Let there be an absence of Congressional carping at the Office of Civil Rights and the courts, a sensible allocation of institutional authority, and an awareness of the political and educational ramifications of desegregation policy. The expectations should be similarly modest. If Congress does act, no one should anticipate dramatic gains

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in minority achievement, the widespread speedy emergence of integrated schools, or the reunification of the society.

All one can realistically hope is that a federal commitment to humane and laudable ends will make the higher aims of integration more likely to be achieved, that the possibility of genuinely political local action within broad constitutional guidelines, in which black as well as white voices are heard, will enable justice to emerge in the particular. Even this hope is no more than a possibility. Federal bureaucrats may stifle needed diversity by adopting ever-tighter rules; the aphorism that "rules beget rules" is all too familiar in Washington. If this political process is systematically sabotaged by communities who promise much, take the federal money and do little, or by states which refuse to exercise any responsibility, there is no reason to expect that the federal government could helpfully further intervene. Despite tough talk in the National Educational Opportunities Act of federal fund cutoffs, success in this enterprise ultimately rests on the frail reed of public trust. The more immediate question is whether a new Congress and a new President will be sufficiently disenchanted with the government's handiwork of the past eight years to make the effort. The need is certainly apparent. Yet one cannot help being skeptical whether, in an era characterized by the promise of good feeling easily won, there will be enough political will to enter into this predictably bloody fray.

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